COLLATERAL CONSEQUENCES AND THE PREVENTIVE STATE

*Sandra G. Mayson**

ABSTRACT

Approximately eight percent of adults in the United States have a felony conviction. The "collateral consequences" of criminal conviction (CCs)—legal disabilities imposed by legislatures on the basis of conviction, but not as part of the sentence—have relegated that group to permanent second-class legal status. Despite the breadth and significance of this demotion, the Constitution has provided no check; courts have almost uniformly rejected constitutional challenges to CCs. Among scholars, practitioners and mainstream media, a consensus has emerged that the courts have erred by failing to recognize CCs as a form of additional punishment. Courts should correct course by classifying CCs as "punishment," the consensus holds, such that constitutional constraints on punishment will apply.

This Article argues for a different approach. The consensus view overlooks the fact that most CCs invoke a judgment of dangerousness as the basis for limiting individual liberty. Given their predictive logic, the Article contends that there are serious costs to classifying (most) CCs as punishment and that the courts have reached a defensible result in declining to do so. Where they have erred is in assuming that, as mere regulation, CCs are benign. On the contrary, laws that restrict certain people's liberty solely on the basis of their perceived propensity to commit future crimes raise both moral and constitutional concerns. Rather than classify CCs as punishment, this Article contends that the better approach to constitutional adjudication of most CCs—for both theoretical and tactical reasons—is to recognize them as predictive risk regulation and seek to develop appropriate constraints.

---

* Research Fellow, Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School. I am deeply indebted to Hadar Aviram, Rachel Barkow, Stephanos Bibas, Barry Friedman, Stephen Galoob, Douglas Husak, Jim Jacobs, David Kamin, Joanna Langille, Ana Munoz, Erin Murphy, Daphna Renan, David Rudovsky, Stephen Schulhofer, Jocelyn Simonson, Eric Singer, Scott Skinner-Thompson, Justin Steil, and Jeremy Waldron for their comments on the work in progress; to Miriam Baer, Adam Cox, Richard Epstein, David Garland, Robert Howse, Adam Kolber, Seth Kreimer, and Liam Murphy for comments in conversation; to the participants of the Lawyering Scholarship Colloquium and the Furman Seminar at NYU School of Law for extremely helpful feedback; to the excellent editors of the *Notre Dame Law Review*; and to my wonderful wife Maron Deering, who has endured the collateral consequences of my work on this project. All errors are mine.

INTRODUCTION

One in four American adults has a criminal record.[1] That statistic includes people who have only been arrested, but the conviction numbers are just as staggering. A recent study finds that "19.8 million persons, representing 8.6 percent of the adult population and approximately one-third of the African American adult male population," have been convicted of a felony.[2] Including misdemeanors, the number must be much greater. No one has managed to calculate it. It is a simple reality: Three decades of mass prosecution have produced a vast criminal class. If we empty the prisons tomorrow, this fact will not change.

This would be sobering news even if people with past convictions could resume normal lives, but we have made that very difficult. "Collateral consequences of conviction" (CCs)—legal disabilities imposed by legislatures on the basis of past conviction, but not as part of a criminal sentence—have proliferated over the last thirty years.[3] They include employment bars, disqualification from public housing and benefits, immigration consequences, offender registration, voter disenfranchisement, and many, many more.[4] The increasing availability and permanence of digital criminal record information has facilitated CCs and amplified their effects.[5] As a composite, CCs

1 MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, THE NAT'L EMP'T LAW PROJECT, 65 MILLION NEED NOT APPLY 27 n.2 (2011); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006).

2 Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, at 12 (paper presented at the 2011 Annual Meetings of the Population Association of America); *see also* Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 281, 290 (2006) (estimating that 16 million people, or 7.5% of the adult population and 33% of black men, had a felony conviction).

3 *See infra* notes 19–32 and accompanying text. The term "collateral consequences of criminal conviction" does not have a single meaning. It can be used to encompass all consequences that flow from conviction beyond a criminal sentence, including private discrimination. *Cf.* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105 (2013) (arguing that "attention should be directed to the array of formal and informal collateral consequences alike that are associated with criminal conviction"). This Article addresses the civil consequences of conviction enshrined in law. It focuses on mandatory consequences (those triggered automatically by conviction with no further individual process), but the central argument applies to discretionary consequences as well. The Article does not use the term "collateral sanctions," as the American Bar Association and Uniform Law Commission have recently done, because in my view that term implies an intent to censure that many CCs lack. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS ix (3d ed. 2004) [hereinafter ABA STANDARDS]; UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010), [hereinafter U.C.C.A.] http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf (defining "collateral sanction").

4 *See* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§ 2.1–.77 (2013).

5 *See generally* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015).

exclude a significant proportion of the populace, disproportionately poor and minority, from basic opportunity and participation in our society. As one scholar has opined, "The collateral consequences of criminal proceedings inflict damage on a breadth and scale too shocking for most lawyers and policy makers to accept."[6]

Constitutional challenges to CCs, meanwhile, have generally failed. Courts have consistently found that CCs do not constitute punishment, and so cannot violate any constraint on the state's power to punish (like the Ex Post Facto Clause or Eighth Amendment). Analyzing CCs pursuant to principles of equal protection or substantive due process, courts have applied the deferential standard of rational basis review, and have rejected nearly all challenges. Immune from the constitutional constraints on punishment and subject only to rational basis review as regulation, CCs have proliferated unchecked.[7]

Among scholars who have addressed this situation, a consensus has emerged that courts have erred by refusing to classify CCs as punishment. These critics contend that CCs are a form of additional punishment, and that courts have defied reality and strained the law to hold otherwise. In one particularly compelling analysis, Gabriel Chin argues that CCs have effectively resurrected the colonial-era punishment of "civil death," and must be understood as punishment, just as civil death was.[8] Meanwhile, mainstream legal organizations have proposed reforms (including revisions to the Model Penal Code) encouraging sentencing judges to consider CCs as part of the punishment for an offense.[9] There is considerable momentum behind the consensus that the law should treat CCs, substantively and procedurally, as "punishment."

This Article argues that the consensus view has overlooked a critical fact: Most CCs purport to control and restrain people not for what they have done, but for what they might do. They claim authority to restrict individual liberty on the basis of a judgment of future risk. This predictive logic does not make CCs unique. On the contrary, they belong to the expanding "preventive state."[10] They are contiguous with other mechanisms of predictive control that have multiplied both within and outside of the criminal justice system, including predictive policing, risk-based sentencing, and targeted surveillance.

Given their predictive logic, the Article contends that there are serious costs to classifying (most) CCs as punishment and that the courts have

---

6 J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 42 (2009).

7 *See infra* notes 42–67 and accompanying text.

8 *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

9 *See infra* notes 80–82 and accompanying text.

10 *See* Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998) (coining term "preventive state" to describe government activities designed to prevent "crime and disorder" through preventive incapacitation).

reached a defensible result in declining to do so. Where they have erred is in assuming that, as mere regulation, CCs are benign. On the contrary, laws that restrict certain people's liberty on the basis of their perceived propensity to commit future crimes raise both moral and constitutional concerns. Predictions of future crime are highly inaccurate; they tend to track stereotypes, and factors used as proxies for future risk both reflect and perpetuate race and class inequality. More fundamentally, predictive restraint contravenes the liberal ideal that the state may not preemptively restrain people who are responsible actors to stop them from committing future crimes.

Rather than classify CCs as punishment, this Article contends that the better approach to constitutional adjudication of most CCs—for both theoretical and tactical reasons—is to recognize them as predictive risk regulation, and seek to develop appropriate constraints. The true challenge, in other words, is the one that Carol Steiker identified fifteen years ago: to develop a rational, robust jurisprudence of preventive justice.[11] The Constitution itself includes no specific constraints on predictive deprivations of liberty, and jurisprudence addressing non-custodial predictive restraints has been almost nonexistent. But the general principles of equal protection and substantive due process can and should have greater traction in this sphere. A meaningful judicial assessment of a given CC, pursuant to either of those guarantees, would consider whether it is a reasonable means of preventing the feared future harm, taking into account (a) the severity and likelihood of the harm, (b) the degree to which the CC infringes individual liberty, and (c) the availability of less restrictive alternatives.

This Article connects and contributes to three scholarly literatures. The first is the legal literature on CCs, which has been primarily concerned with exposing the devastating impact of CCs and advancing pragmatic proposals to mitigate it, and which has urged courts to construe CCs as a form of punishment.[12] The second is the literature of the preventive state, which diagno-

11 *See id.* at 806 (raising question of whether "there [are] any special justifications that would argue for cabining the power of the preventive state"); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 812 (1997) (noting that critics' "conflation of 'punishment' with 'everything bad' . . . obscures and impoverishes discourse about other substantive and procedural limits on state action").

12 *See infra* notes 68–83 and accompanying text. A few scholars, however, have noted the incapacitative logic of CCs in the context of a policy or sociological analysis. *See* DAVID GARLAND, THE CULTURE OF CONTROL 184 (2001) (describing new "criminology of the dangerous other," which includes expanded CCs); Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT / LAW AS REGULATION 79 (Austin Sarat et al. eds., 2011) (noting that CCs "straddle" punishment-regulation divide); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 599, 606 (1997) (offering a "conceptual framework" for "civil disqualifications attending conviction" that recommends, as a policy matter, that such disqualifications be viewed as "civil risk-prevention measures"). Finally, Joel Feinberg, in his famous exposition of the "expressive function of punishment," invoked a conviction-based disqualification as an illustrative contrast to punishment. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397, 400 (1965).

ses and explores the increasing entanglement of criminal justice and predictive risk regulation.[13] Several preventive-state scholars have addressed sex offender registration and civil commitment regimes, but none have considered CCs as a whole.[14] The third is the broader philosophical literature on preventive justice, which has blossomed in recent years.[15] The Article's overarching thesis is that most of today's CCs are a manifestation of the preventive state; that for courts and scholars to classify them as punishment obscures that fact to no good end; and that the urgent need to curtail CCs offers an opportunity to recognize that predictive restraint premised on conviction status is an exercise of the state's police power that warrants greater constitutional oversight than courts have been willing to deploy.

The Article proceeds in four Parts.

Part I briefly narrates the advent of CCs and describes the emerging critical consensus that they should be classified as punishment for constitutional purposes. It notes several reasons for pause.

Part II offers a theoretical framework by positing idealized conceptions of "punishment" and "prevention," then examining the relationship between them and that relationship's implications for legal structure. The model defines punishment as a deprivation that claims normative authorization from a judgment of past culpability and preventive restraint as a deprivation that claims authorization from a judgment of future risk. Part II argues that

13 *See, e.g.*, GARLAND, *supra* note 12; BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); PREVENTING DANGER (Michele Caianiello & Michael Louis Corrado eds., 2013); Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, *in* CRIME AND THE RISK SOCIETY 375 (Pat O'Malley ed., 1998); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1444 (2001); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996); Steiker, *supra* note 11; Steiker, *supra* note 10.

14 *See generally, e.g.*, ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE (2006); Morse, *supra* note 13; Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56 (2004) [hereinafter Morse, *Preventive Confinement*]; Stephen J. Morse, *Protecting Liberty and Autonomy: Desert / Disease Jurisprudence*, 48 SAN DIEGO L. REV. 1077, 1078 (2011) [hereinafter Morse, *Protecting Liberty*]; Robinson, *supra* note 13; Schulhofer, *supra* note 13; Steiker, *supra* note 11; Steiker, *supra* note 10.

15 *See generally, e.g.*, ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE (2014) (product of three-year study seeking to survey field of preventive justice and provide normative framework for its development); ALAN DERSHOWITZ, PREEMPTION (2006); PREVENTION AND THE LIMITS OF THE CRIMINAL LAW (Andrew Ashworth et al. eds., 2013) (compiling essays by prominent scholars); Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637 (2012); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327 (2014); Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 153 (2011); Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173 (2011); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

this conceptual distinction has practical implications for the structure of law because different claims of authority require different procedures and constraints. It contends, finally, that U.S. criminal and constitutional law reflect a deep commitment to the punishment-prevention dichotomy, although current practices threaten it, and that there is good reason to maintain the distinction in law.

Part III acknowledges the dilemma that the real world presents. Real-world restraints on liberty do not often make unitary claims of authority. Many real-world practices instead invoke mixed judgments of culpability and risk; this is the hallmark of the preventive state. It is more accurate to think of these practices along a punishment-prevention spectrum. Different CCs fall at different places along the spectrum, but most fall on the preventive side. Part III argues that classifying such measures as punishment has serious costs. It attenuates the relationship between punishment and culpability and distorts criminal process. Simultaneously, it obscures the risk judgments that CCs entail and precludes the development of effective law to constrain them. Part III suggests that courts should instead classify CCs (and other restraints on liberty) according to whether they claim primary authority from a judgment of culpability or a judgment of future risk. By this measure, most CCs should be classified as preventive measures—specifically, as a form of predictive restraint.

Part IV addresses the question of what role criminal and constitutional law should play in limiting CCs, so understood. It argues that, procedurally, sentencing courts should consider CCs as context in imposing punishment (but not as part of the punishment itself). Substantively, CCs should trigger heightened review in the realm of equal protection or substantive due process. The Article suggests two novel doctrinal arguments for why this is so. Heightened scrutiny would require the state to demonstrate that the CC at issue is a reasonable means of accomplishing its public safety goal; that analysis could consider the severity and likelihood of the feared harm, the onerousness of the CC, and the availability of less restrictive alternatives. Under heightened scrutiny, some CCs would survive—those that are tailored in scope, duration, form, and procedure to their public safety ends. Most CCs, however, would not.

I. THE CRITICAL CONSENSUS: COLLATERAL CONSEQUENCES ARE PUNISHMENT

A. The Advent of CCs

"[C]ivil disqualifications attending conviction" are not new, but the scope of today's CCs is unprecedented in modern times.[16] As a legal form, CCs bear some resemblance to the ancient institution of "civil death."[17] This was the mechanism by which a person convicted of crime was deemed *civiliter*

16 von Hirsch & Wasik, *supra* note 12.

17 *See, e.g.*, LOVE ET AL., *supra* note 4, § 1:3; Chin, *supra* note 8, at 1794–99; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060–61.

mortuus—civilly dead, or stripped of all legal and natural rights.[18] The Supreme Court rejected that institution as early as 1897, but more specific civil-disability provisions remained scattered throughout state statutes, occasionally perplexing courts but apparently receiving little scholarly attention until the zeal of the rehabilitative movement took hold.[19] The 1960s and 1970s focused critical attention on CCs.[20] By the late 1970s, the federal government, state governments, courts, and professional associations had all taken steps to eliminate broad, automatic disabilities triggered by conviction.[21]

Things changed with the launch of the War on Drugs and tough-on-crime politics of the mid-1980s and 1990s. As the federal government dedicated unprecedented criminal justice resources to combating drug use and ratcheted up criminal sentences, it also enacted a series of watershed CCs. These included broad disqualifications triggered by drug offense conviction, vastly expanded immigration consequences of conviction, and the first federal sex offender registration law.[22] These developments appear to have driven the proliferation of CCs at the state level as well.[23]

The "collateral consequences" of conviction now include ineligibility for public housing, benefits, and government educational loans; registration and long-term monitoring; debarment from countless occupations; disenfranchisement; loss of immigration status; ineligibility from jury service; civil forfeiture of property; and limitations on parental rights.[24] While not every

18 *See* Chin, *supra* note 8, at 1794 (quoting Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888)).

19 *See* LOVE ET AL., *supra* note 4, § 1:4; Walter Matthews Grant et al., *Special Project, The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 955 (1970).

20 LOVE ET AL., *supra* note 4, § 1:4.

21 *Id.*

22 The Anti-Drug Abuse Act of 1988 created "civil penalties" for drug offenders, including disqualification from federal student loans and, depending on local implementation, public housing. *See id.*; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C.); MICHELLE ALEXANDER, THE NEW JIM CROW 52–53 (2010). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) disqualified anyone convicted of a felony drug offense from receiving welfare or food stamps—for life. *See* Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.); ALEXANDER, *supra*, at 56, 157. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) dramatically expanded the immigration consequences of criminal conviction. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996); Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (each amending scattered sections of 8 U.S.C., including the Immigration and Nationality Act, 8 U.S.C. §§ 1101–1525 (2012)). The first federal sex offender registration law, the Jacob Wetterling Act, required states to create their own registries or forfeit ten percent of federal criminal justice funding. *See* Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified at 42 U.S.C. §§ 14071–73 (2012)) (superseded by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 102, 120 Stat. 590 (codified at 42 U.S.C. §§ 16901–62 (2012))).

23 *See* LOVE ET AL., *supra* note 4, §§ 1.4–.5, *see also id.* at 14 nn.7–8.

24 *Id.* §§ 2.1–.77.

conviction triggers every disability, the reach of CCs is staggering. To cite a few examples: As of 2010, one in thirteen African-American adults was disenfranchised as the result of a conviction.[25] We removed 199,445 "criminal aliens" in fiscal year 2012—a 238% increase from 2003 and a 677% increase from 1993.[26] The passage of a federal sex offender registration law in 2004 and proliferation of similar state laws have swelled the ranks of sex offender registries. There are now more than eight hundred thousand registrants nationwide.[27] There is an emerging trend of state-level gang registries as well, and some jurisdictions include "violent offenders" or "drug offenders" in registration regimes.[28] The use of civil forfeiture has exploded,[29] and the impact of employment bars and of disqualification from government housing, benefits, and student loans is profound and diffuse.[30]

Over the last decade the issue has begun to attract serious attention. In 2004, the American Bar Association (ABA) issued model standards for "Collateral Sanctions and Discretionary Disqualification of Convicted Persons."[31] In 2007, Congress passed two Acts directed at grappling with the extent of the problem.[32] The Uniform Collateral Consequences of Conviction Act, drafted in 2009, requires a state that enacts it to at least organize its CCs.[33] At this writing, it has been enacted in Vermont and introduced in New York,

25 CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES 1 (2012); *see also* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011) (surveying state disenfranchisement laws).

26 DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, FISCAL YEAR 2002 YEARBOOK OF IMMIGRATION STATISTICS, 191 tbl.46 (2003), http://www.dhs.gov/sites/default/files/publications/Yearbook2002.pdf; DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, FISCAL YEAR 2012 YEARBOOK OF IMMIGRATION STATISTICS, 107 tbl.41 (2013) http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.

27 *See Registered Sex Offenders in the United States*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf (last visited September 24, 2015) (counting 843,260 registrants nationwide by compiling state totals).

28 *See, e.g.*, Kansas Offender Registration Act, KAN. STAT. ANN. §§ 22-4901–4911, –4913 (2011); H.B. 3082, 98th Gen. Assemb. (Ill. 2013) (proposing to make the Illinois State Police's gang database available to the public).

29 *See, e.g.*, Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, at 49.

30 *See, e.g.*, Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 1, 7 (2005) (noting that employment bars "are contained in a range of state and federal laws, and vary considerably in scope," and cataloguing some such bars).

31 ABA STANDARDS, *supra* note 3.

32 *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (requiring National Institute of Justice to conduct national survey of collateral consequences); Second Chance Act of 2007, Pub. L. No. 110-199, §§ 101(d), 101(e)(4), 122 Stat. 657 (codified at 42 U.S.C. §§ 17501–04 (2012)) (requiring that government entities applying to reauthorize certain criminal offender programs include plan to assess "the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community").

33 *See* U.C.C.A., *supra* note 3, at 12.

Maryland, Oregon and the U.S. Virgin Islands.[34] In 2012, the Equal Employment Opportunity Commission issued new guidance warning employers that using criminal records to categorically screen job applicants could expose them to Title VII liability.[35] In 2014, the National Association of Criminal Defense Lawyers released a major report on CCs, the Congressional Overcriminalization Task Force held a hearing on the subject, and the American Law Institute proposed a Model Penal Code chapter to address it.[36] Then-Attorney General Eric Holder sought to reduce federal CCs as part of his Smart-on-Crime initiative.[37] CCs are garnering increasing media coverage and sparking some legislative action.[38] And scholarship on CCs is expanding. Much of this is due to the efforts of dedicated scholars and advocates.

We may have reached a watershed moment for CCs policy. On the other hand, none of the recent CCs policy developments are comprehensive, and most are wholly aspirational.[39] At this stage, the ABA's "National Inventory of the Collateral Consequences of Conviction," which has so far catalogued 45,401 separate conviction-based disabilities in state and federal laws, serves mostly to illustrate the scale of the challenge.[40] There is widespread agreement among scholars and policymakers that CCs must be curtailed, but the prospects for effective change are unclear.

---

34 *Collateral Consequences of Conviction Act*, UNIFORM LAW COMMISSION (Oct.18, 2015, 1:37 PM), http://www.uniformlaws.org/LegislativeMap.aspx?title=collateral%20Consequences%20of%20Conviction%20Act.

35 *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

36 *Collateral Consequences*: *Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014); MODEL PENAL CODE: SENTENCING art. 6x (AM. LAW INST. Tentative Draft No. 3, 2014); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME (2014).

37 *See* Memorandum from Att'y Gen. Eric Holder to the Heads of Dep't of Justice Components and United States Att'ys (Aug. 12, 2013), www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-collateral-consequences.pdf (describing Holder's efforts to promote successful re-entry of ex-offenders, including efforts to reduce CCs).

38 *See, e.g.*, The Record Expungement Designed to Enhance Employment Act (REDEEM Act) of 2014, S. 2567, 113th Cong. (2014) (introduced in the Senate on July 8, 2014, by Rand Paul).

39 *See, e.g.*, UNIF. LAW COMM'N, COLLATERAL CONSEQUENCES OF CONVICTION ACT SUMMARY (2015), http://www.uniformlaws.org/ActSummary.aspx?title=collateral%20Consequences%20of%20Conviction%20Act (describing the Act's objective as providing "modest means" for persons with convictions to obtain "partial relief" from collateral disabilities); Margaret Colgate Love, *States "Rethinking" Collateral Consequences? Vera Institute Jumps the Gun*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Jan. 7, 2015), http://www.ccresourcecenter.org/2015/01/07/states-rethinking-collateral-consequences-not-fast-vera-institute/.

40 AM. BAR ASS'N, NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION (2013), http://www.abacollateralconsequences.org; *see also* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 254 (2002) (noting that CCs make "knowing" and "intelligent" guilty pleas impossible because "[n]o one knows, really, what they are").

B. No Judicial Check

And what of the courts? Collateral consequences have proven extremely resistant to legal challenge. There are practical reasons for this. While the criminal process provides a structure within which to raise legal objections and counsel to do so (in theory), CCs take effect after the conclusion of criminal proceedings. An ex-offender has no right to counsel on the day he finds himself stricken from the voting rolls or his benefits application denied. It is hard even for a CCs challenge to get to court. Secondly, when an ex-offender or impact litigation group does marshal the resources to bring a challenge, it is targeted at a specific measure: a particular disenfranchisement or sex offender registration law, the deportation of one individual. Addressing such challenges, courts have tended not to question the constitutional ramifications of CCs as a whole.

These realities are problematic, because the cumulative impact of CCs matters. It obviously has profound significance for society. It is also significant for the law. Different CCs raise the same legal questions; doctrine developed to address one informs the analysis of another. This means, writ large, that courts have deployed a more or less consistent framework to address the phenomenon of CCs as a whole.

It operates as follows. Federal constitutional challenges to CCs fall into two broad categories. The first genre of challenge alleges that a given CC violates one of the many provisions in the Constitution that constrain the state's authority to inflict punishment: the Eighth Amendment's requirement of proportionality, or the prohibitions on double jeopardy, ex post facto laws, and bills of attainder, among others.[41] The second kind of challenge alleges that the CC in question violates one of the broader substantive limits on the state's power to regulate individuals: substantive due process or equal protection.[42]

The first kind of challenge—pursuant to constitutional constraints on punishment—has intuitive appeal. CCs are deprivations imposed on the basis of a criminal conviction. They add to the burden of the offender's sentence. If the sentence imposed was calculated, as federal law explicitly requires, to be "sufficient, but not greater than necessary" to achieve the goals of punishment, the burdens imposed by CCs exceed this limit by defini-

41 *See, e.g.*, Smith v. Doe, 538 U.S. 84 (2003) (challenging a sex offender registration law pursuant to Ex Post Facto Clause); Turner v. Glickman, 207 F.3d 419, 428–31 (7th Cir. 2000) (challenging a drug-offender welfare bar pursuant to Double Jeopardy Clause, *inter alia*); El-Amin v. McDonnell, No. 3:12-cv-00538-JAG, 2013 WL 1193357, at *7 (E.D. Va. Mar. 22, 2013) (rejecting Eighth Amendment challenge to felon disenfranchisement law).

42 *See, e.g.*, *Turner*, 207 F.3d at 426–28; LOVE ET AL., *supra* note 4, §§ 3.16, 3.18 (canvassing equal protection and substantive due process challenges). Procedural due process challenges to mandatory CCs generally fail because such CCs are imposed solely on the basis of conviction. *See infra* notes 239–42 and accompanying text. Challenges to CCs may also allege violations of more specific rights, but the topic of this paper is the constitutional issues that CCs present in common.

tion.[43] This seems like a prima facie violation of the Eighth Amendment requirement of proportionality. Millions of people are subject to CCs that did not exist when they pled guilty or took the chance of going to trial. This seems like it should violate the Ex Post Facto Clause. Given that CCs are deprivations of liberty imposed in addition to, and independently of, a criminal sentence, one might think they violate the Double Jeopardy Clause.

To violate any of these provisions, however, the challenged measure must constitute "punishment."[44] Governments defending this kind of challenge typically assert that the measure at issue is not punishment at all, but rather a regulatory measure with a non-punitive aim—sex offender registration laws, to protect the community;[45] voter disenfranchisement provisions, to protect the integrity of the franchise;[46] immigration consequences, to "protect[ ] the public from dangerous criminal aliens" and limit residence to people of good character;[47] bars to government benefits, to prevent fraud and allocate scarce resources to the most deserving.[48] The court must then determine whether the challenged measure qualifies as punishment or regulation.

The Supreme Court has found this task "extremely difficult and elusive of solution."[49] Aside from CCs, the question has periodically arisen in challenges to ad hoc legislative acts imposing disabilities on the reviled group of the day (former Confederates after the Civil War; Chinese immigrants at the turn of the century; communists, suspected "subversives," deserters, and draft evaders in the mid-twentieth century; and Richard Nixon, after his impeach-

43 18 U.S.C. § 3553(a) (2012).

44 *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (holding that the Double Jeopardy Clause applies only to criminal punishment); Cummings v. Missouri, 71 U.S. 277, 320 (1866) (holding that Bill of Attainder Clause applies only to criminal punishment); Calder v. Bull, 3 U.S. 386 (1798) (holding that Eighth Amendment prohibition on cruel and unusual punishment and Ex Post Facto Clause apply only to criminal punishment). The Eighth Amendment Excessive Fines Clause may be an exception; it may apply to fines that have "punitive" character even if they cannot be classified as punishment for purposes of other constitutional provisions. *See* United States v. Bajakajian, 524 U.S. 321, 329 n.4 (1998) (noting that government conceded that forfeiture in question was "punitive in part," which "is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause").

45 *See, e.g.*, *Smith*, 538 U.S. at 94, 105.

46 *See, e.g.*, Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

47 Demore v. Kim, 538 U.S. 510, 515 (2003); *see also, e.g.*, Galvan v. Press, 347 U.S. 522, 531 & n.4 (1954) (noting that although "the intrinsic consequences" of deportation are "close to punishment," the Ex Post Facto Clause "has no application to deportation"); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."); Hinds v. Lynch, 790 F.3d 259, 267–68 (1st Cir. 2015) (concluding that removal on basis of conviction is not punishment, and collecting other circuit decisions reaching same conclusion in recent years).

48 *See, e.g.*, Turner v. Glickman, 207 F.3d 419, 428–31 (7th Cir. 2000).

49 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

ment).[50] It has arisen, too, with respect to taxes, penalties, fines, and forfeitures imposed in connection with disfavored activities.[51] Most recently, the Court has addressed it in challenges to preventive detention and sex offender registration.[52]

For the last thirty years, the Court has deployed a two-pronged analysis to determine whether a challenged measure constitutes "punishment." First, it asks whether the legislative intention behind the measure was "to impose punishment" or "to enact a regulatory scheme that is civil and nonpunitive."[53] If the legislature intended to punish, that ends the analysis. If not, the Court considers "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[54] It conducts this "effects" inquiry by considering seven factors, first enumerated in *Kennedy v. Mendoza-Martinez*, as "guideposts."[55] Because the Court will "ordinarily defer to the legislature's stated intent,"[56] "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[57]

The Court last undertook this analysis in *Smith v. Doe*, a challenge to Alaska's sex offender registration law pursuant to the Ex Post Facto Clause.[58]

---

50 *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 429 (1977); United States v. Brown, 381 U.S. 437, 458 (1965); *Kennedy*, 372 U.S. at 165–66; Flemming v. Nestor, 363 U.S. 603 (1960); Trop v. Dulles, 356 U.S. 86, 96–97 (1958) (plurality opinion); *Galvan*, 347 U.S. at 522; United States v. Lovett, 328 U.S. 303, 306 (1946); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 589 (1889); *Ex Parte* Garland, 71 U.S. 333, 379–80 (1866); Cummings v. Missouri, 71 U.S. 277, 320 (1866).

51 *See* United States v. Bajakajian, 524 U.S. 321 (1998); United States v. Ursery, 518 U.S. 267, 270–71 (1996); Bennis v. Michigan, 516 U.S. 442 (1996); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994); Austin v. United States, 509 U.S. 602, 610 (1993); United States v. Halper, 490 U.S. 435, 447 (1989); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Ward, 448 U.S. 242 (1980); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938); United States v. Constantine, 296 U.S. 287, 294–96 (1935); Lipke v. Lederer, 259 U.S. 557, 561–62 (1922); Child Labor Tax Case, 259 U.S. 20 (1922); Helwig v. United States, 188 U.S. 605 (1903).

52 *See, e.g.*, Smith v. Doe, 538 U.S. 84 (2003); Kansas v. Hendricks, 521 U.S. 346 (1997); United States v. Salerno, 481 U.S. 739 (1987); Allen v. Illinois, 478 U.S. 364, 366 (1986); Schall v. Martin, 467 U.S. 253, 269 (1984).

53 *Smith*, 538 U.S. at 92 (citing *Hendricks*, 521 U.S. at 361).

54 *Id.* (alteration in original) (quoting *Hendricks*, 521 U.S. at 361).

55 *Id.* at 97, 105 (quoting Hudson v. United States, 522 U.S. 93, 99 (1997)). The factors are: whether the challenged measure "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose[ ]" and "whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime." *Id.*

56 *Id.* at 92 (quoting *Hendricks*, 521 U.S. at 361).

57 *Id.* (quoting *Hudson*, 522 U.S. at 100).

58 *Id.*

The Court found, at step one, that Alaska had not intended the law to impose punishment, but rather to protect the public.[59] Proceeding to the "effects" analysis, the Court omitted two of the factors, and analyzed others, tautologically, on the basis of the state's intent.[60] It concluded that the plaintiffs could not show, "much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme."[61] The Ex Post Facto challenge was dismissed. Jurisdictions nationwide have since ratcheted up the requirements of their sex offender registration laws, driven in part by federal funding incentives.[62] Many of the new regimes involve residency restrictions, "community notification" of offenders' whereabouts, and GPS monitoring.[63] Despite this dramatic evolution, the federal courts of appeal, invoking *Smith*, have uniformly held that sex offender registration and monitoring do not qualify as "punishment."[64]

The Supreme Court and lower courts have arrived at the same conclusion with respect to other CCs.[65] Constitutional restrictions on punishment therefore do not apply. As to the second genre of constitutional challenge—pursuant to substantive due process and/or equal protection principles—courts have generally found that CCs warrant only rational basis review.[66]

---

59 *Id.* at 96.

60 *See id.* at 105 (acknowledging that ASORA is triggered by past crime and scienter but finding these factors "of little weight," because conviction is "a necessary beginning point" in any scheme to reduce recidivism); *id.* at 99 (finding that ASORA did not resemble shaming punishments because its "objective" was not to inflict "stigma" but "to inform the public for its own safety"); *id.* at 102 (finding that ASORA's design did not promote retribution because it was "consistent with the regulatory objective").

61 *Id.* at 105.

62 Federal funding for a range of state criminal justice operations is contingent on "substantial" implementation of the federal Sex Offender Registration and Notification Act (SORNA). *See* 42 U.S.C. §§ 16901–25 (2012).

63 *See, e.g.*, LA. REV. STAT. ANN. 15:542 (2012) (broad community notification); 42 PA. CONS. STAT. ANN. § 9799.27 (2012) (community notification); *id.* § 9799.30 (2012) (GPS tracking).

64 *See, e.g.*, United States v. Parks, 698 F.3d 1, 6 (1st Cir. 2012); United States v. Stock, 685 F.3d 621, 627 n.4 (6th Cir. 2012); United States v. Elkins, 683 F.3d 1039, 1049 (9th Cir. 2012); United States v. W.B.H., 664 F.3d 848 (11th Cir. 2011); United States v. Leach, 639 F.3d 769, 773 (7th Cir. 2011); United States v. Young, 585 F.3d 199, 206 (5th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 935–38 (10th Cir. 2008); United States v. May, 535 F.3d 912, 919–20 (8th Cir. 2008).

65 *See, e.g.*, Demore v. Kim, 538 U.S. 510, 531 (2003) (mandatory immigration detention); De Veau v. Braisted, 363 U.S. 144 (1960) (employment disqualification); Hawker v. New York, 170 U.S. 189 (1898) (employment disqualification); Johnson v. Bredesen, 624 F.3d 742, 753 (6th Cir. 2010) (felon disenfranchisement); Turner v. Glickman, 207 F.3d 419, 428–31 (7th Cir. 2000) (disqualification from public benefits). The Supreme Court has not actually grappled with the question of whether disenfranchisement laws constitute "punishment," but its dicta to the contrary in *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958), has been taken as precedent. *See id.*

66 *See* LOVE ET AL., *supra* note 4, §§ 3.16, 3.18 (cataloging such challenges). Voter disenfranchisement would seem to infringe a fundamental right, but the Supreme Court has

Very rarely have CCs statutes failed that standard.[67] Collateral consequences have thus escaped serious constitutional scrutiny. They have effectively been held constitutionally immune.

C. The Critical Consensus, and Reasons for Pause

To the extent that scholars and commentators have addressed this situation, they have focused on the first genre of constitutional challenge. They have uniformly argued that CCs *are* punishment, and that the courts have erred in finding otherwise.

The critical response to *Smith v. Doe* is illustrative. That decision has been consistently and roundly condemned. Its many critics urge a more rigorous application of the effects test to sex offender registration laws.[68] They echo criticism of the Supreme Court's punishment jurisprudence that long predates that case (including criticism from the bench).[69] These commentators urge courts to hold that once registration requirements attain a certain degree of severity, they must be classified as "punishment."[70] And it is entirely possible for courts to do this. Without disclaiming the Supreme Court's opinion in *Smith*, lower courts can point to differences between the Alaska law and the new generation of registration statutes and find the new

held that, because Section 2 of the Fourteenth Amendment contemplates disenfranchisement for crime, it does not. *See* Richardson v. Ramirez, 418 U.S. 24, 42 (1974).

67 LOVE ET AL., *supra* note 4, §§ 3.16, 3.18.

68 *See, e.g.*, Wayne A. Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, 26 CRIM. JUST. 37, 38–39 (2011) (calling *Smith v. Doe* "[d]ubious [d]octrine" that "significantly understates the actual effects of registration and community notification"); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1400 (2008) ("We might avoid some of the slop simply by reinvigorating the *Kennedy v. Mendoza-Martinez* standard . . . ."); Andrea E. Yang, *Historical Criminal Punishments, Punitive Aims and Un-"Civil" Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. CIN. L. REV. 1299, 1303 (2007) ("[A] logical and robust application of the *Ward* test and the *Mendoza-Martinez* factors . . . should weigh in favor of finding at least the more stringent versions of sex offender post-custody residency restrictions to be punitive . . . .").

69 *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 565 (1979) (Marshall, J., dissenting) (describing majority's punishment analysis as "lack[ing] any real content"); Artway v. New Jersey, 81 F.3d 1235, 1242 (3d Cir. 1996) (observing that "the law on 'punishment' is complicated and in some disarray"); *Opinion of the Justices to the Senate*, 668 N.E.2d 738, 750 (Mass. 1996) ("Without some indication of the weight and priority of these [*Mendoza-Martinez*] factors, however, that test risks an unmanageable indefiniteness.").

70 *See supra* note 68; *see also, e.g.*, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1303 (1998) ("If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment." (quoting *Artway*, 81 F.3d at 1263)).

regimes to be punitive "in effect." Indeed, some have.[71] Scholars have urged a similar approach to other CCs.[72]

A growing body of scholarship makes the same argument with respect to collateral consequences as a whole.[73] The case is compelling. CCs are imposed on the basis of conviction for a criminal offense. They can dwarf an offender's actual sentence in severity or significance. The Supreme Court itself, in *Padilla v. Kentucky*, recognized that deportation as the result of a conviction is a "particularly severe 'penalty,'"[74] even if not "in a strict sense, a criminal sanction," and "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants."[75] In addition to holding that the Sixth Amendment requires defense counsel to provide accurate advice about potential immigration consequences of a conviction, the Court expressed a broader skepticism about the distinction between "direct" and "collateral" consequences in that context.[76] The decision has led to speculation that the Court might reconsider the

71 *See, e.g.*, State v. Letalien, 985 A.2d 4, 26 (Me. 2009); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); *In re* J.B., 107 A.3d 1 (Pa. 2014). In addition, a number of state supreme courts have held registration regimes to violate state constitutional constraints on punishment.

72 *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1350 (2014) (arguing that immigration detention "ought to be considered punishment").

73 *See, e.g.*, Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 584 (2006) (arguing that CCs "are simply another layer of punishment"); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (describing CCs as a "secret sentence"); Chin, *supra* note 8, at 1792 (arguing that "the degradation of a convict's legal status" is "a unitary punishment, the new civil death"); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) (characterizing CCs as "de facto punishment"); Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1192 (2006) ("Collateral consequences are a legal burden constituting punishment . . . ."); Ristroph, *supra* note 68, at 1400; McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479 n.2 (2005) ("[C]alling these consequences 'collateral' is merely a legal fiction—the person experiences the consequences as punishments regardless of the label."); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that "punishment [may be] accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United States"); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1726 (1996) (arguing that criteria for punishment analysis should be "'the concerns of individuals' . . . rather than the purpose or intentions of the state").

74 559 U.S. 356, 365 (2010) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

75 *Id.* at 364, 365 (footnote omitted).

76 *Id.* at 366.

direct/collateral, criminal/civil, or punitive/regulatory distinctions with respect to other consequences, or in other constitutional arenas.[77]

Scholars have welcomed this development. Gabriel Chin makes a persuasive case that even if individual CCs might not qualify as "punishment," the overall degradation of legal status that conviction now entails—which subjects ex-offenders to the whole panoply of CCs—is a modern iteration of colonial-era "civil death," and like civil death is a "momentous punishment" that the law must acknowledge.[78] On Chin's view, *Padilla* and prior Supreme Court jurisprudence contain the seeds of this doctrine.

If CCs were classified as punishment, there might be a clearer case that procedural due process requires notice to an accused person of all the CCs that a guilty plea might trigger.[79] At the back end of the criminal process, if CCs are punishment, then sentencing courts must account for them in crafting a sentence.[80] As the hard work of advocates has brought CCs into mainstream view, major legal organizations have taken up that position.

Both the American Bar Association (ABA) and American Law Institute (ALI) have proposed reforms that encourage sentencing courts to consider CCs as part of the punishment for an offense. The ABA's Standards for Criminal Justice urge courts to consider CCs "in determining an offender's overall sentence."[81] The ALI has proposed a new chapter of the Model Penal Code to address CCs, reasoning that, although they may be labeled as civil measures, "collateral consequences carry punitive weight" and affect core sentencing goals.[82] The proposed provisions direct sentencing courts to apply the principle of proportionality "with reference to the total package of sanctions imposed in each case," including CCs that the conviction is likely to trigger, because CCs "are experienced by the offender as additional punishments."[83]

A consensus has thus emerged, among scholars, advocates, and mainstream legal organizations, that CCs should be classified as "punishment" for constitutional purposes and considered in sentencing accordingly. That is to

---

77 *See generally, e.g.*, McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795 (2011).

78 *See generally* Chin, *supra* note 8.

79 This is because the lower courts have consistently held due process to require that a defendant be informed of "direct" but not "collateral" consequences of his plea. *See generally, e.g.*, Chin & Holmes, *supra* note 73, at 703–12; Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131–34 (2009). The Supreme Court cast strong doubt on this doctrine, however, in *Padilla v. Kentucky*. *See* 559 U.S. 356 (2010); *infra* notes 233–37 and accompanying text.

80 *Cf.* Julia L. Torti, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908, 1937 (2013) (arguing for consideration of CCs "during proportionality review").

81 ABA STANDARDS, *supra* note 3, at Standard 19-2.4.

82 MODEL PENAL CODE: SENTENCING xxi (AM. LAW INST., Tentative Draft No. 3, 2014); *see also id.* art. 6x.

83 *Id.* art. 6 cmt. f; *see also* Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247 (describing new MPC provisions).

say: the law should treat CCs, substantively and procedurally, as "punishment." There is considerable momentum behind this consensus. As Alec Ewald has noted, "commentators from a variety of perspectives have concluded that collateral sanctions are 'a legal burden constituting punishment.'"[84]

Yet there are several reasons for pause. The first is that this approach has a conceptual snag. Critics who urge courts to apply a more rigorous "effects" test falter at the question of when and why the "effects" of a measure might render it punitive. It cannot be that there is a threshold of severity. Some punishments are severe, but others are light. The same is true of regulatory burdens. Your annual income tax may be a greater burden than a fifty dollar fine for committing a simple battery, but it is generally agreed that the latter is punishment and the former is not. Nor can the form of the burden be determinative, unless we are prepared to reclassify all civil detention and property confiscations as punishment. It is not at all clear what empirical "effects" could suffice to create a punishment. Given that conceptual uncertainty, is a stricter effects test the right path for the law and for people burdened by CCs?

The second reason for pause is that the courts are not delusional; many CCs do seem driven by a preventive logic. Registration regimes, employment and licensure bars, disqualification from public housing, bars to gun ownership and fostering children—all of these ostensibly aspire to prevent the public, or certain members of the public, from harm. Proponents of the punishment approach tend to discount this fact, or assume that it is irrelevant to constitutional classification. Are they right? How *should* courts determine whether CCs—and other measures that seem to mix punitive and preventive qualities—qualify as "punishment?" Given the doctrinal confusion, the next Part looks to theory. It introduces idealized conceptions of "punishment" and "preventive restraint," then explores the distinction between them and that distinction's significance for the law.

II. Punishment Versus Preventive Restraint

A. The Distinction in Theory

1. The Concept of Punishment

There is surprisingly little direct discussion in punishment theory of what distinguishes punishment from other forms of state coercion. Most of the debate centers instead on the purpose and legitimacy of punishment—that is, on the questions of what punishment is for, and why (or under what circumstances) it is justified.[85] The debate is fierce, but not relevant here.

84 Ewald, *supra* note 12, at 93.

85 For the last century, retributive, deterrent, expressive, rehabilitative, and incapacitative theories have battled for dominance, with the pendulum of public opinion swinging toward rehabilitation in the middle of the twentieth century and away, toward incapacitation, at the end. In addition to the questions of when and why punishment is justified,

The relevant question here is the "logically prior" question of what punishment *is*.[86] What distinguishes punishment, in conceptual terms, from other deprivations of liberty and property—from quarantine, or tax penalties?

Among contemporary legal theorists who have addressed this question, however, there is a degree of consensus. The consensus point is that punishment conveys a judgment of culpability. Other exercises of state power inflict hardship, aim to deter disfavored conduct, incapacitate the dangerous, or promote rehabilitation. The thing that distinguishes punishment is, as Carol Steiker has written, that it necessarily "expresses blame."[87]

To say that punishment necessarily expresses blame (or stigma, or censure) is to say that it requires—or at least is thought to require—a judgment of blame. Put inversely, punishment is hard treatment inflicted as a putatively just consequence of blameworthy conduct. The state that punishes claims normative authority to inflict suffering on the basis of the punished person's culpable behavior.

This is not a retributive conception of punishment, at least not in the narrow sense. It does not speak directly to the purpose of punishment. By this conception, punishment may serve consequentialist aims. A system that threatens and inflicts punishment may strive to prevent harm (through deter-

---

there is a distinct question about when the *state* is justified in inflicting it. *See, e.g.*, Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 221 (1973); Michael Philips, *The Justification of Punishment and the Justification of Political Authority*, 5 LAW & PHIL. 393, 394 (1986).

86 Steiker, *supra* note 11, at 799.

87 *Id.* at 800–05 (describing evolution of scholarship on question of what defines "punishment"); *accord, e.g.*, ASHWORTH & ZEDNER, *supra* note 15, at 14 (identifying "censure" as one of "key elements" of punishment, and implicitly as the only unique element); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11, 13, 17 (2d ed. 2008) (noting that culpability requirement—"the restrictive principle of Distribution"—distinguishes punishment from preventive restraint); DOUGLAS HUSAK, OVERCRIMINALIZATION 95 (2008) (defining punishment as "the intentional infliction of a stigmatizing deprivation"); Douglas Husak, *Preventive Detention as Punishment*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 15, at 178, 181 (asserting that "punishment necessarily contains (at least) two essential features: *hard treatment* (or *deprivation*) and *stigma* (or *censure*)"); Andrew von Hirsch, *Censure and Proportionality*, *in* A READER ON PUNISHMENT 115, 118 (R.A. Duff & David Garland eds., 1994) (asserting that difference between a tax and a punitive fine is that "the fine conveys disapproval or censure, whereas the tax does not"); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 580 (2012) ("When a public institution . . . seeks to deliver just deserts and communicate moral condemnation—or in lay terms, to assert blame—it acts as a 'punisher.'"); Feinberg, *supra* note 12, at 400 (identifying expression of blame as distinguishing feature of punishment); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."). Related formulations that focus on the trigger for punishment include the propositions that crimes are forbidden rather than priced by the law, *see, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984), that crime is a public wrong, *see, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *2, and that crimes are moral violations, *see* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 756, 777–78 (1943).

rence or incapacitation), to rehabilitate, or to express community norms. But whatever its ultimate purpose, punishment is conditioned on and expressive of blameworthiness. To use Douglas Husak's phrasing, it is inflicted "in virtue of" culpability, though it may be imposed "in order to" pursue any number of utilitarian goods.[88] This conception is consistent with nearly all "theories" of punishment.[89]

The point here, though, is neither that this conception of punishment is inevitable, nor that it is descriptively accurate. Setting questions of accuracy aside, let us adopt it as a purely theoretical construct. We can call it the culpability conception of punishment.[90] The conception has several implications. First: Culpability is a necessary condition of punishment. To intentionally "punish" the blameless is not really to punish at all.[91] Relatedly, culpability limits the quantum of punishment. If culpability is a condition of

88 Douglas Husak, *Do We Need a "Third Way"? Ferzan on Preventive Detention*, 13 PHIL. & L., Spring 2014, at 10, 11 ("In asking what punishment is *for*, we may want to know (a) what it is in virtue of which we punish; or (b) for what purpose or goal is punishment imposed? When disambiguated, it is plausible to say that the criminal law is *for* both. That is, it is imposed in virtue of past crime, but its purpose is (at least partly) preventive."); *see also* HART, *supra* note 87, at 1–27, 40–53 (arguing that "general justifying aim" of criminal law is harm prevention); *id.* at 23 ("This is a method of social control which maximizes individual freedom within the coercive framework of law . . . .").

89 The disagreement among retributivists, expressivists, contractarians, and qualified consequentialist theorists is about the purpose of (and justification for) punishment. On a retributive view, punishment serves the purpose of imposing just deserts, which also justifies it. *See generally, e.g.*, MICHAEL S. MOORE, PLACING BLAME (1997). Related expressivist views see the purpose of punishment as expressing condemnation. *See, e.g.*, Feinberg, *supra* note 12, at 400. A qualified consequentialist position like Hart's holds that the goal of criminal law is to prevent social harm, but "principles of justice" require that it simultaneously respect individual self-determination. *See* HART, *supra* note 87, at 1–27, 40–53; *see also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66 (1968) (explaining view that culpability is necessary limitation on utilitarian goals of punishment). All of these "theories of punishment" concede the centrality of culpability. Even Victor Tadros's "duty view" of punishment appears to invoke culpability as a necessary condition of, and limitation on, punishment. *See* VICTOR TADROS, THE ENDS OF HARM 283–91 (2011) (explaining that "wrongdoing" incurs duty that punishment can discharge, and that offender may only be punished to "the equivalent degree" that he could justifiably have been harmed to avert his initial wrongdoing). A pure consequentialist view that the purpose of punishment is unfettered deterrence, rehabilitation, or incapacitation might deny the culpability constraint—but then cannot explain what distinguishes punishment from other forms of deterrence, rehabilitation, and incapacitation. In other words, the only view that denies the culpability constraint is that of a "punishment skeptic" who denies that punishment is a coherent or distinct concept at all.

90 The culpability conception presumes and overlaps with what Nicola Lacey calls the "principle of responsibility." *See* Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 350, 353 (2001).

91 *Cf.* John Rawls, *Two Concepts of Rules*, *in* PUNISHMENT 58, 62 (Joel Feinberg & Hyman Gross eds., 1975) (coining term "telishment" for notion of sanctions not premised on culpability, and arguing that "punishment" is limited, by definition, to sanctions for a blameworthy act).

the first year of punishment, it must also be a condition of the last.[92] Second: Punishment both requires and reflects a judgment of blame.[93] And finally: Punishment presumes choice. A person cannot be blamed for things beyond her control.[94]

A system of punishment, on this conception, must have several basic features to operate with coherence. It must not interfere with a person's liberty unless she commits a culpable act.[95] Rather, it must strive to influence her choices by threatening unpleasant consequences for certain bad acts. It must provide fair notice of the behavior deemed wrongful, because in order to be culpable a person must have a fair chance to avoid it. And it may inflict punishment only upon a determination that a person did in fact act culpably, and then only to the extent warranted by her culpability.

This kind of punishment system has an internal normativity. It aspires to prevent wrongdoing while maximizing individual choice. A punishment system built on this model is, as H.L.A. Hart wrote, a "choosing system."[96] And because punishment, on this model, reflects culpability for an act rather than the status of a person, it entails the idea of redemption.[97] Punishment asserts that the law-breaker could have acted differently in the past. This implies the mirror principle: he can act differently in the future.

---

92 In other words, this conception of punishment requires a "limiting-retributivist" view that desert must at least be a "side-constraint" on the quantum of punishment. *See, e.g.*, LARRY ALEXANDER ET AL., CRIME AND CULPABILITY 7–13 (2009) (defending one version of this view); ASHWORTH & ZEDNER, *supra* note 15, at 18 (noting "broad acceptance" that punishment should not be disproportionate to culpability); RICHARD S. FRASE, JUST SENTENCING 82–119 (2012) (explaining that, pursuant to limiting retributivism, punishment may be crafted to further consequentialist goals "[w]ithin the range of deserved (or *not undeserved*) penalties").

93 It is unclear, however, which way the causation runs—is it because punishment requires a judgment of blame that it necessarily expresses censure, or because it expresses censure that it requires a judgment of blame?

94 The sense in which a person must "choose" or "control" her action in order to deserve blame, and whether any of us can exercise that form of control, is the subject of intricate philosophical debate. That debate is thankfully beyond the scope of this Article. I simply presume that human persons do exercise "choice" in the relevant sense, whatever it may be.

95 That is, it must be an *ex post* sanction rather than an *ex ante* restraint. *See* Saul Smilansky, *The Time to Punish*, 54 ANALYSIS 50 (1994) (arguing that "punishment" imposed prior to the commission of a crime—so-called "prepunishment"—cannot be conceived as punishment at all). There is a debate over whether punishment must be limited to acts, or whether it may also be imposed for states of affairs for which the agent is culpable, but this debate does not affect the temporal requirement that punishment be an *ex post* sanction. I agree with Husak that the act requirement is not a deep requirement, merely a proxy for the deep requirement of culpable control, but for simplicity's sake will continue to refer to the conventional proxy here. *See* Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2438 (2007) (arguing that "commentators should suspend judgment about the act requirement, and probably reject it altogether").

96 HART, *supra* note 87, at 44.

97 *Cf.* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476 (1968); C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953).

In summary, punishment, according to this conception, is a deprivation that purports to reflect a person's culpable choice and therefore conveys special stigma. This structure implies that choice is meaningful—that future action is not certain, that human beings can choose what they do, and that this power carries special responsibility.[98] Dogs and infants may be trained; only persons can be punished.[99]

2. The Concept of Prevention

Preventive interference in individual lives seems, at first blush, a very different mode of coercion than punishment. One conventional formulation holds that prevention is "forward-looking" while punishment is "backward-looking," but that is misleading, given that punishment can serve preventive goals. The threat of punishment, moreover, is itself a preventive measure. Let us say instead that if punishment is imposed "in virtue of" culpability, a preventive measure is imposed "in virtue of" risk.[100] It claims normative authority to intervene on the basis of some danger. Culpability need play no role. Consider quarantine, civil commitment of the dangerous and mentally ill, speed limits, and speed bumps. These are all preventive measures. They do not depend on any judgment of culpability, and do not, in theory, express censure. They depart, rather, from a judgment of risk.

The broad category of prevention can be divided along two important axes. The first is by mode. Some preventive measures seek to avert harm by inducing certain behaviors, either through incentives or deterrent threats. Such measures leverage individual agency; they work "through the mind," by giving people good reasons not to do bad things.[101] Other preventive measures operate through direct physical control, without regard to a person's power to choose (like civil commitment, and speed bumps). These are incapacitative. Secondly, preventive measures can be divided according to whether they are addressed to the general population or target a specific person or group. Whereas basic criminal prohibitions are generalized deterrent measures, the threat of special penalties for fiduciaries who commit fraud is a targeted deterrent regime. Whereas speed bumps are a generalized form of incapacitation, civil commitment is a targeted form.

This last subset of prevention—*targeted* incapacitation, or what this article will call "predictive restraint"—claims normative authority to incapacitate a person on the basis that she herself poses some special future risk. It inter-

98 *See, e.g.*, Morse, *supra* note 13, at 121 (noting that punishment bounded by desert "takes seriously and affirms the human potential for responsible, moral agency"); *cf.* T.M. Scanlon, Jr., *The Significance of Choice*, *in* THE TANNER LECTURES ON HUMAN VALUES 151 (1986) (investigating "nature and basis" of significance of choice to design of social and political institutions).

99 Morris, *supra* note 97, at 486.

100 *See* ASHWORTH & ZEDNER, *supra* note 15, at 21 ("[T]he general rationale for imposing a coercive preventive measure is the prevention of harm . . . and not the censure of the person subjected to the measure.").

101 HART, *supra* note 87, at 133.

venes to restrain her before the fact. As a method of preventing future crime, this is the Minority Report model.

Predictive restraint raises several concerns. Most obviously, incapacitation is the most intrusive form of prevention. If an incentive or threat is equally effective at preventing bad acts, the law should prefer that less intrusive option. It may not be equally effective, of course, which means that this is a prima facie objection to incapacitation only.[102] The second objection to incapacitation is that it ignores individual agency. It is often said to "deny" individual agency, on the basis that it assumes that the "dangerous" person lacks the capacity to obey the law.[103] But this is not precisely true. The restraining authority might believe that she has full capacity to obey and still prefer to eliminate the risk of her choosing not to.[104] Predictive restraint, in other words, does not deny agency per se. Yet nor does it affirm individual agency, as a system of punishment does. It simply elides it. It is indifferent to agency altogether.

One way of explaining this distinction is to say that preventive incapacitation is regulatory, whereas culpability-constrained punishment is an iteration of "law." As Markus Dirk Dubber has chronicled, regulatory governance is the modern incarnation of "police" governance.[105] It aspires to maximize the welfare of the state as a whole.[106] The ideal of "law," meanwhile, emerged as a reaction against the ideal of the police state, and aspires to implement a liberal conception of individuals as autonomous, rights-bearing persons.[107] In Jeremy Waldron's terms, the structure of law reflects a commitment to "the dignity of the human individual."[108] Law, distinctively,

102 If incapacitation provides some incremental benefit over an incentive regime or the threat of ex post sanctions, the ultimate normative question is whether the incremental security benefit is worth the increment cost, including the cost in liberty. *Cf.* Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 803 (1996) (noting that we regularly permit ex ante intrusions on autonomy that provide incremental benefits over the threat of ex post sanctions); Ferzan, supra note 15, at 178 ("The State is . . . permitted to limit our freedom in myriad ways for good reason.").

103 *See* ASHWORTH & ZEDNER, *supra* note 15, at 150 ("The judgment that an individual poses a significant risk of serious harm rests on the claim that he does not have the capacity to choose to do right . . . . [Or that] he will not in fact exercise that capacity to restrain himself."); Ferzan, *supra* note 15, at 153 ("[W]hen we detain someone because he might harm us . . . we deny that he will choose wisely and just predict that he will cause harm."); Saul Smilansky, *supra* note 95, at 52 (arguing that "pre-punishment" fails to "respect . . . the moral personality of the agent" by declining to treat her as "capable of not committing the offense").

104 I am grateful to David Garland for this point.

105 Markus D. Dubber, *Regulatory and Legal Aspects of Penality*, *in* LAW AS PUNISHMENT / LAW AS REGULATION 19, 21 (Austin Sarat et al. eds., 2011).

106 *Id.* at 28–40.

107 *Id.*

108 Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 206 (2012) [hereinafter Waldron, *Dignity*]; Jeremy Waldron, *Respectful Coercion* 8–14, 20–32 (draft on file with author) [hereinafter Waldron, *Respectful Coercion*].

treats individuals as rational agents with the capacity for self-determination and a unique appreciation of their own interests. To the extent possible, it operates by guiding action rather than by physically manipulating it.[109] As Waldron phrases it, law enables and requires states to engage in "respectful coercion."[110] The threat of punishment for willful wrongdoing operates through respectful coercion. Predictive incapacitation does not.

A great deal of other *ex ante* regulation also ignores agency, but predictive restraint, deployed as a means of crime control, is unique in that it does not just limit personal autonomy. It limits moral autonomy. And moral autonomy arguably has special value. As Saul Smilansky has written, people's moral choices are "constitutive of their moral worth and self-creation."[111] If liberty of moral action is especially valuable, then interference that preempts moral choices may have a special cost.[112] That cost is heightened when the restraint is targeted. Such restraint implies that the "dangerous" people it targets are less likely to follow the law than others. It brands them as lesser moral agents.

There is also, finally, a powerful epistemological objection to any kind of predictive measure that limits individual liberty. It is hard to predict future harm. It is especially hard to accurately predict that a given person will commit a specific future crime.[113] There is a contentious debate among experts about whether the likelihood of such an event can be assigned on an individual basis at all.[114] Inaccurate prediction means costly prevention, in terms of liberty, security and resources alike.[115] This may be a problem of knowledge rather than a categorical normative problem with preventive restraint, but it is fundamental.[116]

For all of these reasons, it is commonplace in criminal law theory that predictive restraint is an inappropriate means of preventing crimes by

109 Waldron, *Dignity*, *supra* note 108, at 215–18.

110 *Id.*; *see generally* Waldron, *Respectful Coercion*, *supra* note 108.

111 Smilansky, *supra* note 95, at 52; *see also* R.A. DUFF, CRIMINAL ATTEMPTS 389 (1996) (arguing that if "we intervene forcibly to prevent [a person from] advancing his criminal enterprise, we cease to treat him as a responsible agent: we deny him the freedom to decide for himself whether to desist"); Smilansky, *supra* note 95, at 53 (arguing that society must afford responsible actors the "moral chance" not to commit crime).

112 *Cf.* Morse, *Protecting Liberty*, *supra* note 14, at 1122 n.143 (suggesting that preemptive incapacitation to prevent "dangerous intentional conduct" has special cost in liberty).

113 *See, e.g.*, *id.* at 1081–85; *see also* ASHWORTH & ZEDNER, *supra* note 15 at 124, 133–42; JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 1–19 (1981); David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 420 (2014) (addressing "the challenge of reasoning from group data to decisions about individuals"); Nicholas Scurich & Richard S. John, *A Bayesian Approach to the Group Versus Individual Prediction Controversy in Actuarial Risk Assessment*, 36 LAW AND HUM. BEHAV. 237 (2012).

114 *See supra* notes 111–13.

115 *See* Robinson, *supra* note 13, at 1450–54.

116 *See* Stephen J. Morse, *Neither Desert nor Disease*, 5 LEGAL THEORY 265, 266 (1999) (arguing that there are "insurmountable problems" with the just implementation of pure preemptive restraint).

responsible agents. This principle is expressed in the "mad or bad" doctrine, which holds that the threat of punishment is "the only permissible means of using force for controlling crime by those who are generally responsible for what they do, regardless of how dangerous they may be."[117] People who lack rational agency, however, cannot be deterred, cannot be culpable, and so cannot be punished. For this group, and only for this group, the state may resort to predictive control.[118]

B. Implications for Legal Structure

The conceptual distinction between punishment and preventive restraint has significance for the ideal structure of law, because state interference that claims authority from an actor's culpable conduct requires different procedures and constraints than interference that claims authority from a risk of future harm.[119]

To begin with, judgments of culpability and judgments of future risk require different procedures. Determining culpability for a past act requires answering questions of past fact (what happened, and with what mental states), and then a question of desert, which is ultimately subjective and moral. The factual questions can, in principle, be answered to one hundred percent certainty—that is, they can in principle be "proven" beyond a reasonable doubt.[120] Because questions of culpability are backward-looking, finality has clear value in this context, and it makes sense to encourage it through statutes of limitations and other legal structures. It is an open question whether judges, juries, legislatures, or sentencing agencies are best situated to make these factual and moral determinations, but it is at least arguable that the everyday experience and moral conscience of the community should drive both.[121]

Preventive restraint, in contrast, requires a determination of future risk, and then a decision about whether the value of mitigating the risk outweighs

117 Michael Louis Corrado, *Terrorists and Outlaws*, *in* PREVENTING DANGER, *supra* note 13, at 3, 3–4; *see also, e.g.*, Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 877 (2011) ("[A]n individual may not be deprived of his liberty unless the reasons for doing so respect his status as an autonomous person.").

118 Corrado, *supra* notes 117, at 3–4. Stephen Morse expresses this principle in terms of a "desert/disease" dichotomy. *See generally* Morse, *Protecting Liberty*, *supra* note 14.

119 *Cf.* Robinson, *supra* note 13, at 1432 ("Punishment and prevention . . . rely on different criteria and call for different procedures.").

120 That is, excluding the metaphysical skeptic's objection that we cannot know anything at all in an ultimate sense.

121 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xviii (2012) (arguing that criminal justice system should depend less on professional "insiders" and more on experience and moral judgments of "victims, defendants, and ordinary citizens"); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (arguing for more localized criminal justice).

the cost (including the cost in liberty).[122] It hinges on probabilistic questions about future events and value questions about security/liberty tradeoffs. The probabilistic questions central to preventive restraint cannot, even in theory, be "proven." This makes "proof beyond a reasonable doubt" incoherent as an evidentiary standard—future events are simply not susceptible to proof.[123] The evidentiary standard for demonstrating risk should, instead, relate to (1) the severity of the harm feared, and (2) the likelihood of its occurrence within a specified timeframe.[124] These kinds of determinations require expert evidence, clinical and actuarial, and perhaps expert judgment. And whereas propensity evidence is likely to be more prejudicial than probative with respect to questions of past fact, it is essential to probabilistic questions about likely future conduct. Furthermore, whether a given restraint is warranted will depend on whether there are less restrictive means of achieving the same level of protection—another question that might demand expert opinion. Lastly, all of these determinations are contingent, subject to change with future conditions. Finality is counterproductive in this context. On the contrary, assessments of dangerousness and the necessity of restraint should be subject to perpetual revision.[125]

Deprivations premised on judgments of future risk also require different constraints than those premised on judgments of culpability. Any constraint on desert-based deprivations must ensure that they do reflect, and do not exceed, what a person deserves. This raises difficult philosophical questions that make the constraint hard to implement (What is "desert" in any given case? Does culpability require punishment, or just limit punishment?), but the basic principle is clear.[126] To ensure both proportionality and finality,

122 *See, e.g.*, Robinson, *supra* note 13, at 1439–41; Steiker, *supra* note 11; *see also* Addington v. Texas, 441 U.S. 418, 429 (1979) (noting that conviction entails the determination of "a straightforward factual question—did the accused commit the act alleged?," whereas "[w]hether the individual is mentally ill and dangerous to either himself or others . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists").

123 *See* Norval Morris, *'Dangerousness' and Incapacitation*, *in* A READER ON PUNISHMENT, *supra* note 89, at 241, 251–54 (discussing why evidentiary standards for questions of past fact and future risk must be differently structured).

124 *See* ASHWORTH & ZEDNER, *supra* note 15, at 119 ("If the deprivations entailed by preventive measures are to be warranted, appropriate, and proportional, it is necessary to calculate both the gravity of the risked harm and the likelihood of it occurring."); *id.* at 119–22, 142 (discussing the logically appropriate structure of an evidentiary standard for determinations of preventive restraint).

125 *See* Robinson, *supra* note 13, at 1446–47, 1450–53.

126 *Cf.* ASHWORTH & ZEDNER, *supra* note 15, at 18 ("There appears to be broad acceptance, even among those who are not wholly wedded to retributivism or desert theory, that in principle the punishment for an offence should not be disproportionate to the seriousness of the crime(s) committed (in terms of culpability and wrongdoing)."). For an argument that culpability is a necessary but not sufficient condition for punishment, see Douglas Husak, *Retributivism* in Extremis, 32 LAW & PHIL. 3, 12–16 (2013) (arguing that "in all but the most extreme cases the state requires additional reasons to treat criminals as they deserve").

constraints like ex post facto and double jeopardy prohibitions make sense. Finally, because state censure carries distinctive power, punishment may call for robust procedural and substantive constraints even when the deprivation is minimal.[127]

Deprivations that claim authority from a judgment of future risk require entirely different constraints.[128] To be justified as a necessary restraint of individual autonomy, a preventive restraint must strike an appropriate balance between security and liberty. The deprivation must not be too great in relation to the risk. The relevant inquiry is a means-end analysis that questions whether the restraint is a reasonable means of preventing the feared harm.[129] This also raises tough questions (what is a "reasonable means"?), but the structure of the analysis is a means-end test. It might assess, for example, whether the restraint is the least restrictive measure reasonably available to prevent the feared harm.[130] Desert and finality constraints have no place in this logical framework. But the "least restrictive measure" principle has its own implications. It means that even in the case of a grave threat warranting full detention of a person, the restraining authority must allow the person maximum autonomy within her detention. Conditions of preventive restraint should not be punitive.[131] Lastly, to the extent a society wishes to

127 *Accord, e.g.*, Steiker, *supra* note 11, at 782, 797–809 (arguing that punishment requires "a distinct and specially stringent procedural regime" for this reason).

128 As Ashworth and Zedner have put it,

> where the rationale is desert, the punishment must censure the subject in a way and to an extent that respects his or her responsible agency . . . . Where prevention is the rationale its logic applies without respect for whether the subject is a responsible agent or not, since the purpose is to obtain the optimal preventive outcome.

ASHWORTH & ZEDNER, *supra* note 15, at 19; *cf.* Marcus D. Dubber, *Preventive Justice: The Quest for Principle*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 15, at 47 (arguing that, because preventive measures are form of police governance rather than law, principles of law are inapposite as constraints).

129 *Accord* DERSHOWITZ, *supra* note 15, at 224 ("Primary among the factors that should be considered are the severity, certainty, and imminence of the threat, on the one hand, and the nature, scope, and duration of the contemplated preemptive actions, on the other.").

130 *See* ASHWORTH & ZEDNER, *supra* note 15, at 168–70, 254, and *passim* (suggesting "some preliminary constraining principles" for preventive restraint); Morris, *supra* note 123, at 241, 251–54; Robinson, *supra* note 16, at 1446–47, 1450–53.

131 Furthermore, if treatment is available to mitigate the threat, the restraining authority should make it available. *See* ASHWORTH & ZEDNER, *supra* note 15, at 167 (asserting that constraints on preventive detention should include "periodic review, non-punitive conditions, use of least restrictive alternatives, and the right to treatment"); Robinson, *supra* note 13, at 1446–47. And it arguably must provide compensation to the person restrained, since she has been deprived of liberty not on the basis of her wrongdoing, but solely for the public good. *See, e.g.*, Corrado, *supra* note 102, at 814 (arguing that it is "both fair and efficient" to compensate a person preventively detained—"fair because he is paying out of his own resources to prevent harm to others and efficient because if he is compensated the community will not be likely to squander his freedom without justification"); *see also* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1062–66 (2004) (arguing "for

limit the use of predictive restraint to prevent crime by responsible agents, the law must enforce this principle.[132]

None of this is to suggest that deprivations imposed in virtue of future risk should trigger a different *degree* of procedural protection or substantive constraint than deprivations imposed in virtue of culpability. The degree of protection for individual rights should depend on the severity of the deprivation inflicted. Severe preventive deprivations should trigger many of the procedural protections afforded to criminal defendants, like evidentiary standards that lay heavy burdens of proof and persuasion with the state, as well as the right to counsel, public hearings, free access to transcripts and records, and an appeals process.[133] The point, rather, is that different grounds of authority for state interference require different structures of analysis, and different forms of constraint. The next subsection descends from the conceptual ether to assess how the punishment-prevention dichotomy operates in U.S. law.

C. The Distinction in U.S. Law

1. The Distinction Reflected in Law

To a significant extent, U.S. criminal and constitutional law distinguish between deprivations imposed in virtue of culpability and those imposed in virtue of risk. In general, they reflect the culpability conception of punishment. On the preventive side, they profess a commitment to the principle of mad-or-bad.

To begin with, basic structural features of the criminal law imply that punishment is a deprivation authorized by culpability. As a general matter, U.S. criminal law operates through the threat of ex post sanctions for specified bad acts. It does not employ Precogs; it does not punish pre-crime.[134] It aspires to prevent harm by influencing people's choices. In its broad outlines, the criminal law is structured as a "choosing system."[135]

Internally, the system includes controls to ensure that conviction is a determination of a person's responsibility for a specific past act, not a charac-

---

financial compensation to all innocents who have been swept into preventive detention" in his proposed emergency scheme).

132 *Cf.* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 514–51 (2004) (arguing for substantive constitutional criminal law premised on "the concept of the person, understood as an individual possessed of the capacity for autonomy").

133 *See* ASHWORTH & ZEDNER, *supra* note 15, at 25, 260–64 ("[T]here is a separate stream of justification for procedural safeguards, . . . [which] flows from the fundamental nature of the rights at stake when the imposition of some coercive preventive orders is being proposed. . . .").

134 *See* MINORITY REPORT (Twentieth Century Fox 2002); *see also* Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (observing that our current system "incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law").

135 HART, *supra* note 87, at 44.

ter judgment or risk assessment.[136] It prohibits status crimes, bars character and propensity evidence, and requires the state to prove, beyond a reasonable doubt, that a person committed a specific bad act.[137] Conviction is a determination of responsibility, not of risk.

Other rules are meant to ensure that the person convicted is actually blameworthy. To convict, the fact-finder must determine not only that the accused person committed the proscribed act, but also that he intended to do so.[138] Intent confers responsibility because it implies choice; the actor could have acted differently than he did.[139] The law does not hold people criminally responsible for mental and physical conditions, accidents, unconscious reflexes, or actions taken under certain extreme forms of duress.[140] Nor does it hold those responsible whose cognitive faculties are so impaired that they cannot engage in rational deliberation.[141] To be convicted is to be deemed a rational agent capable of choice, and to be held responsible for a specific poor choice you have made.[142] In theory, the convicted person is subject to punishment by virtue of his agency, his freely chosen act.[143] As for

136 *See* FED. R. EVID. 404 (prohibiting introduction of character or propensity evidence, with limited exceptions); *see also* Robinson v. California, 370 U.S. 660, 660 (1962) (holding a statute that made it a crime to "be addicted to the use of narcotics" to violate the Eighth Amendment).

137 *In re* Winship, 397 U.S. 358, 364 (1970).

138 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) (explaining that the intent requirement "is no provincial or transient notion" and that it is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil"); *see also* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (affirming "general rule" that "a defendant must be 'blameworthy in mind' before he can be found guilty").

139 *Id.*; *cf. Robinson*, 370 U.S. at 667 (finding punishment of addiction unconstitutional on ground that addiction could "be contracted innocently or involuntarily," even before birth, and, analogously, that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

140 *See, e.g.*, HART, *supra* note 87, at 14.

141 *See id.* It is unclear whether this limitation has constitutional stature or not, and, if it does, what the "baseline for due process" entails. *See* Clark v. Arizona, 548 U.S. 735, 752 n.20 (2006) ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require.").

142 *See, e.g.*, Paul H. Robinson, *A System of Excuses: How Criminal Law's Excuse Defenses Do, and Don't, Work Together to Exculpate Blameless (and Only Blameless) Offenders*, 42 TEX. TECH. L. REV. 259 (2009).

143 Some readers will object that the Supreme Court has upheld strict liability offenses and rejected a constitutional requirement of mens rea. This is debatable. *See, e.g.*, John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 659–700 (2012) (canvassing "strict liability" cases and concluding that "[t]he Supreme Court has interpreted even public welfare offenses to require a sufficiently blameworthy state of mind to satisfy the culpability principle"); *see generally* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 861 (1999) (arguing that "the United States Supreme Court has recently reinvigorated its concern with protecting innocent persons as a bedrock of federal criminal law"). In any case, the argument here is not that actual practice or Supreme Court doctrine has hewed

the quantum of punishment, the 2007 revisions to the Model Penal Code mandate that it not exceed desert.[144]

The structure and content of the federal Constitution also presume the culpability-based conception of punishment. The text devotes substantial attention to criminal procedure, and alludes to punishment as a unique form of deprivation.[145] This suggests the assumption, on the part of the Framers, that punishment carries a "distinctive stigma"[146]—the result of reflecting culpability rather than liability alone.[147] The enumerated constraints on punishment affirm the culpability conception. The Fifth Amendment prohibition on double jeopardy implies a backward-looking determination of guilt.[148] The logic of the Ex Post Facto Clause, which expresses the principle of *nulla poena sin lege* ("no punishment without law"), is that people cannot be punished for an act that was not proscribed when committed.[149] The Supreme Court has held the Eighth Amendment to prohibit punishment that is grossly disproportionate to the offense, although it has applied the doctrine inconsistently at best.[150]

---

perfectly to the culpability conception of punishment. The discrepancy between ideal and reality is taken up later.

144 *See* MODEL PENAL CODE: SENTENCING § 1.02(2) (AM. LAW. INST., Tentative Draft No. 1, 2007) (directing judges "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders").

145 The point can also be phrased in terms of the concept of "crime," which triggers punishment. *See* Stinneford, *supra* note 143, at 673–700 ("Crime is one of the central preoccupations of the United States Constitution, but the term is never defined anywhere in the text. . . . The reader's knowledge of the concept appears to be assumed.").

146 Schulhofer, *supra* note 13, at 81.

147 *See* Stinneford, *supra* note 143, at 664–67; *see also* Felton v. United States, 96 U.S. 699, 703 (1877) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.").

148 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

149 *See id.* art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."); Collins v. Youngblood, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."); *cf.* Bouie v. City of Columbia, 378 U.S. 347, 350 (1964) (holding due process to require "that a criminal statute give fair warning of the conduct which it prohibits").

150 *See, e.g.*, Weems v. United States, 217 U.S. 349, 367 (1910) ("[P]unishment for crime should be graduated and proportioned to offense."); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39 (2008) (explaining that text of Eighth Amendment and some aspects of related doctrine imply culpability constraint, and noting that many states' constitutional text or doctrine do so more explicitly); Stinneford, *supra* note 143, at 723 (concluding that "the Supreme Court still uses proportionality review to protect the values inherent in the culpability principle, but it does so in an inconsistent and disingenuous manner"); *see also* Samuel Weiss, Note, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*,

The Supreme Court's preventive detention case law, meanwhile, proclaims loyalty to the principle of mad-or-bad (or, in Stephen Morse's terminology, the desert/disease dichotomy).[151] *Foucha v. Louisiana* is the Court's clearest statement on the subject.[152] The petitioner in *Foucha* had been charged with a criminal offense, found not guilty by reason of insanity, and civilly committed. Within a few years it was clear that he no longer suffered from a mental illness, but Louisiana continued to hold him on the basis that he remained dangerous. A majority of the Court held that this detention for dangerousness alone violated the Constitution. It cited several grounds, but its central holding was that substantive due process prohibits the purely preventive detention of responsible actors, except in "certain narrow circumstances."[153] Writing for the majority, Justice White observed that to allow the continued confinement of people like Foucha would "be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[154]

The Court's jurisprudence since *Foucha* has reaffirmed the prohibition on detention for dangerousness alone, without "some additional factor" suggesting that the criminal law is inadequate to prevent future crimes.[155] Stephen Schulhofer has read this case law to manifest the principle that criminal law must always be society's "first line of defense" against people who are self-determining agents.[156]

2. The Distinction Under Siege

An informed reader will object that this survey of U.S. law is selective to the point of deception. If many facets of legal doctrine and practice reflect

---

49 HARV. C.R.-C.L. L. REV. 569, 569 (2014) (arguing that "states should aggressively police the proportionality of noncapital sentences under their state constitutions").

151 *See generally* Morse, *Protecting Liberty*, *supra* note 14.

152 504 U.S. 71 (1992).

153 *Id.* at 80.

154 *Id.* at 83. Justice White also noted the State's failure to explain why, if Foucha were sane, it could not vindicate its interest in public safety through "ordinary criminal processes." *Id.* at 82.

155 *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 412 (2002) ("*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997))); *Hendricks*, 521 U.S. at 358 (explaining that the requirement of an "additional factor" like mental illness serves "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); *cf.* Minnesota v. Probate Court, 309 U.S. 270, 274 (1940) (upholding civil confinement of a person where evidence showed his "utter lack of power to control . . . sexual impulses").

156 Schulhofer, *supra* note 13, at 93; *cf.* von Hirsch & Wasik, *supra* note 12, at 607 ("Where the future decisions of a person . . . are at issue, our legal tradition has shown, quite correctly, a reluctance to intervene before the fact.").

the culpability conception of punishment, and profess loyalty to the principle of mad-or-bad, just as many undercut them.[157] Mandatory minimums, three-strikes laws, pre-trial detention for dangerousness, risk-based sentencing—all of these, and many other components of contemporary criminal justice, seem to collapse the distinction between punishment and prevention.[158]

These practices reflect a recent transformation in the culture of American criminal justice. In 1992, Malcolm Feeley and Jonathan Simon diagnosed "the new penology," a shift in criminal-law discourse and institutions "from a concern with punishing individuals to managing aggregates of dangerous groups."[159] Five years later, Carol Steiker described a convergence between criminal law and regulatory institutions toward the preemptive control of dangerous people. She termed the resulting institutional and legal complex "the preventive state."[160] That convergence is ongoing. Within the criminal justice system, incapacitation continues to be a central theme. Preemptive policing tactics are pervasive.[161] In court, the practice of "actuarial justice" prioritizes "evidence-based" risk assessment at all stages of criminal proceedings.[162] At least in some jurisdictions, arrest and misdemeanor proceedings have come to serve as regulatory tools to monitor and control broad populations.[163] Preventive regimes continue to proliferate outside the formal boundaries of the criminal justice system as well.[164]

---

157 *Cf.* Nicola Lacey, *supra* note 90, at 355 (noting that in England and America the "responsibility principle" is "extravagantly honoured" but "regularly breached").

158 *Cf.* Ewing v. California, 538 U.S. 11, 20 (2003) (upholding sentence of twenty-five years to life for third-strike theft of three golf clubs, with incapacitative rhetoric); United States v. Salerno, 481 U.S. 739 (1987) (upholding pre-trial detention for dangerousness); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence for third minor felony fraud against Eighth-Amendment challenge, ostensibly on basis of its incapacitative purpose).

159 Feeley & Simon, *supra* note 13, at 449; *see also* David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 24 (2008) (explaining that, instead of attempting to "create an orderly society by reshaping individual souls, the new penology does so by preemptively excluding those predicted to be disorderly").

160 Steiker, *supra* note 11, at 819; *see also* Steiker, *supra* note 10.

161 *Cf.* Paul Butler, *Stop and Frisk: Sex, Torture, Control*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra* note 12, at 155, 171 (arguing that stop-and-frisk practices serve "a regulatory purpose" as opposed to a punitive one); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 335 (2015) (exploring the concern that in the era of "big data," "reasonable suspicion will focus more on an individual's predictive likelihood of involvement in criminal activity than on an individual's actions").

162 HARCOURT, *supra* note 13; Feeley & Simon, *supra* note 13.

163 *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

164 Examples include restraints on sex offenders, people with suspected terrorist affiliations (e.g., the No-Fly list), and "criminal aliens," as well as expanded use of restraining orders (especially in the context of domestic violence). All of these aspire to at least partial incapacitation as a means of preventing criminal acts. Targeted surveillance programs also engage in the predictive logic of the preventive state. Meanwhile, the new technologies and vast data at the state's command have enlarged the possibilities for preventive regimes. *See, e.g.*, Daskal, *supra* note 15, at 374–76; Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J.

Rather than a clear punishment-prevention dichotomy, contemporary U.S. law deploys mixed systems of risk administration. As Simon and Feeley wrote, "[t]he new penology replaces consideration of fault with predictions of dangerousness and safety management."[165] It is concerned not with individual culpability, but "with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial, not transformative."[166] In some sense this may be a return to the ethos of eighteenth-century Anglo-American criminal justice, when justices of the peace could detain "those persons whom there is a probable ground to suspect of future misbehavior." [167] Whether it has revived an old model or pioneered a new one, though, it seems clear that U.S. criminal justice in the new millennium has taken a distinctly predictive turn.

3. Why Classify

By one view, the conceptual distinction between punishment and prevention is now so far removed from reality that we are better off forsaking it altogether.[168] Courts and scholars, on this view, should give up the endless game of trying to diagnose state-imposed burdens on liberty as one or the

---

1321, 1405–06 (2008). The trend is not limited to the United States; a number of European countries have lately expanded their efforts at preventive surveillance and control. *See generally* PREVENTING DANGER, *supra* note 13 (addressing preventive regimes in Europe); ASHWORTH & ZEDNER, *supra* note 15, at 144–70 (cataloguing preventive measures within and outside criminal law, with a focus on the U.K.).

165 Feeley & Simon, *supra* note 13, at 457.

166 *Id.* at 452. The turn to plea-bargaining has facilitated this shift. *See, e.g.*, BIBAS, *supra* note 121, at xvi ("The [plea-bargaining] machinery of criminal justice, and its need for speed, has taken on a life of its own far removed from what many people expect or want."); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1048 (2006) (arguing that the criminal justice system has become "an administrative system where the prosecutor combines both executive and judicial power"); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2134–35 (1998); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) ("We now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.").

167 *See* ASHWORTH & ZEDNER, *supra* note 15, at 28–29 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *251); *id.* at 28, 30–40 (characterizing eighteenth-century Anglo-American criminal justice as taking a largely preemptive approach, particularly via activities of night watches and early police departments); *id.* at 40–50 (suggesting that emphasis of criminal justice shifted toward punishment over course of nineteenth century as Kantian conception of individual displaced notions of criminal character); *id.* at 49 (suggesting "modern actuarial techniques constitute something of a resurgence of much earlier assumptions about the power of the state to identify, categorize, and apprehend would-be offenders."); *see also, generally*, Lacey, *supra* note 90 (describing her efforts to trace development of the responsibility ideal in social history and criminal law).

168 *See, e.g.*, Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L.Q. REV. 225 (2000); John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996); Lacey, *supra* note 90, at 354 ("The starting point for much recent research has been a degree of scepticism about whether criminal law in fact reflects any consistent and principled idea of individual responsibility.").

other, and build a new conceptual and legal vocabulary that speaks in the broader terms of state coercion.

That is a dangerous path. As discussed above, culpability- and risk-based deprivations demand different procedures and constraints. State-imposed burdens must be classified as one or the other to be channeled into an appropriate regime. The Constitution's enumerated constraints on "punishment," meanwhile, require courts to decide which deprivations are the sort of thing they were designed to constrain. Some boundary line must be drawn. Given that fact, the culpability/risk line is the division that best comports with constitutional and criminal law. To abandon the culpability conception of punishment, on the other hand, is arguably to forsake any cogent definition of "punishment" at all. That would render the Constitution's special limits on punishment deeply incoherent, as well as the special institutions of the criminal law. Most fundamentally, the culpability conception of punishment reflects the unique value of human choice. If we hope for the law to serve that function, we need the doctrinal structures to sustain it. Notwithstanding the expanding preventive state, then, the law has good reason to distinguish between deprivations imposed in virtue of culpability and deprivations imposed in virtue of risk.

III. Ordering a Messy World

Given that the preventive state tends to invoke both culpability and risk as authorization for deprivations of liberty, the challenge is how to classify such deprivations in a coherent way. The specific challenge, for present purposes, is how to classify CCs. This Part proposes that we conceive of them along a punishment-prevention spectrum. It suggests that courts should ultimately classify CCs, and other deprivations, according to whether they claim primary authorization from a judgment of culpability or a judgment of risk.

A. The Punishment-Prevention Spectrum

Contemporary practices of punishment and prevention do not fall into a neat conceptual dichotomy, but it is possible to plot them along a spectrum. At one end is "pure" punishment: the class of deprivations that claim authority from a judgment of culpability, with little or no regard to a person's future risk (for instance, a modest fine for shoplifting by a contrite teen). At the other end is "pure" prevention: deprivations that claim authority from a judgment of risk, with no regard to a person's culpability (like quarantine).

Note that even the two extremes of the spectrum are not absolute. "Pure" punishment is itself a form of prevention. Even if the person punished poses no future risk, her punishment may have the purpose or effect of deterring future crimes by others. At the other extreme, "pure" preventive deprivations tend to impose stigma whether or not it is intended. This is especially true of incapacitative restraints. The exclusion of HIV-positive people at national borders, the quarantine of possible Ebola carriers—these restraints mark their subjects as dangerous, contaminated. They entail no

formal judgment of culpability, and yet they foster suspicions that the person restrained is somehow at fault for her condition. Aside from the implication of culpability, even pure preventive restraints can be profoundly oppressive. They are "punitive" in the experiential sense of the word.

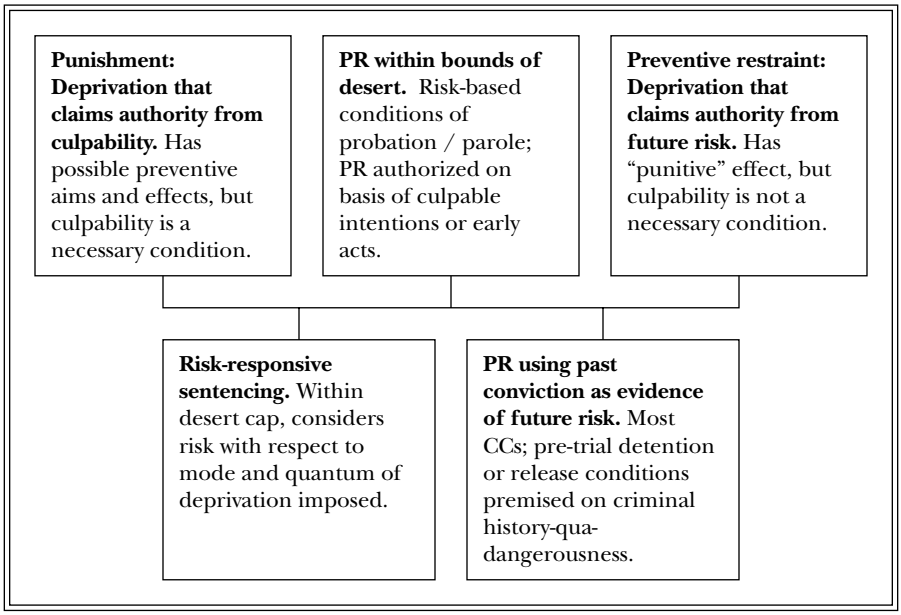
Other deprivations, which invoke more mixed judgments, fall at various points along the spectrum. One step away from "pure" punishment, we might locate sentencing determinations that consider a person's future risk in determining, within the bounds of desert, the quantum and conditions of punishment. Farther along the spectrum—perhaps at the center—are deprivations imposed solely for preventive purposes that nonetheless claim primary authorization from a judgment of culpability. Probation and parole conditions motivated by risk concerns might belong here. This is also where we would place efforts to restrain people who culpably intend to commit some future harm.[169] Finally, on the preventive restraint side of the spectrum but not at the extreme, are practices of risk management that look to past culpability as evidence of future risk, like the preventive detention of "sexually violent predators" and risk assessment based on criminal history.

The following diagram illustrates the spectrum.[170]

169 Kimberly Kessler Ferzan proposes that we conceptualize such restraint as "defensive force" or "preventive interference" authorized on the ground that the agent's culpable intentions and preliminary acts render him "liable" to such interference. *See* Ferzan, *supra* note 15, at 147–48. Michael Corrado prefers to call it "punitive restraint." *See* Corrado, *supra* note 102, at 790 n.60 (suggesting that scholars "[s]eparat[e] out punitive restraint from preventive detention, conced[e] that someone may be punitively restrained for as long as he actively intends to harm another, and recogniz[e] a certain grayness in the notion of 'actively intending'"). Douglas Husak argues that it fits perfectly well within existing frameworks of criminal liability, including for inchoate crimes. *See* Husak, *supra* note 15 (arguing that detention for preventive ends can be conditioned on blameworthiness and subject to desert proportionality, and therefore can and should be conceptualized as punishment). Whatever vocabulary we assign it, the normative structure of the deprivation is that it is imposed *in virtue of* culpability, but solely *in order to* incapacitate a person from committing future harm.

170 There is the further wrinkle that some deprivations imposed in connection with punishment claim authority on the basis of other regulatory goals, like compensating victims. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93 (2014). One could frame the spectrum more broadly, as a continuum between deprivations that invoke culpability and deprivations that invoke regulatory aims. This Article, however, limits its discussion to culpability and future risk.

THE PUNISHMENT/PREVENTION SPECTRUM



B. CCs on the Spectrum

Where do CCs fall along the punishment-prevention spectrum? It depends whether they invoke a judgment of culpability or a judgment of future risk as the authorizing ground of the deprivation. By that measure, CCs are distributed along the spectrum, mostly on the preventive side.

States consistently defend the great majority of CCs on the basis of future risk. This is reflected in court decisions addressing them. The Supreme Court's cases are illustrative. In *Hawker v. New York*,[171] the Court found that New York, by disqualifying convicted felons from the practice of medicine, sought "to protect its citizens from physicians of bad character."[172] The law took conviction to demonstrate that a person was "a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care."[173] In *De Veau v. Braisted*,[174] the Court found that a statute barring convicted felons from employment on the waterfront was a regulatory effort to combat corruption. While expressing some misgivings, the Court concluded that conviction was an acceptable measure of risk in the circumstances at hand.[175] And in *Smith v. Doe*, the Supreme Court noted that

171 170 U.S. 189 (1898).
172 *Id.* at 196.
173 *Id.*
174 363 U.S. 144 (1960).
175 *Id.* at 159–60 (noting "impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation").

Alaska's sex offender registration law was designed to "allow the public to assess the risk on the basis of . . . the registrants' convictions," and that it applied categorically because of the "dangerousness" of "sex offenders as a class."[176]

States invoke similar judgments of dangerousness to defend most classes of CCs. Sex offender registration and commitment regimes are the clearest example. The stated purpose of conviction-based employment bars is generally to protect a business or profession and its clients from future misconduct.[177] Disqualification from public housing purportedly protects the residents of housing communities from violence and criminal activity.[178] Conviction-based criteria for foster and adoptive parents are intended to protect children from bad acts by would-be parents.[179] Bars to gun ownership are meant to prevent gun crimes. All implicitly invoke the judgment that people with past convictions are likely to commit future harm.

At the other end of the spectrum, there are a few measures that have sometimes been deemed "collateral" to conviction, but are openly intended as retributive and deterrent sanctions for culpable conduct. The Denial of Federal Benefits Program, for example, authorizes federal and state courts, as a sentencing option and alternative "to more traditional and often more expensive forms of punishment," to deny federal benefits to people convicted of drug offenses.[180] Such measures clearly invoke a judgment of culpability.

The remainder of CCs fall somewhere in the middle. This group includes immigration consequences, other barriers to government benefits, and felon disenfranchisement laws. Governments offer various rationales for these laws, but they are relatively consistent across fields. The first is a forfeiture rationale, the notion that the convicted person has forfeited a given right or privilege.[181] The second is the state's desire to allocate limited gov-

176 538 U.S. 84, 104 (2003).

177 *See, e.g.*, *De Veau*, 363 U.S. at 144; *Hawker*, 170 U.S. at 189.

178 *See* 42 U.S.C. § 13661 (2012) (authorizing local housing authorities to exclude persons who "may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents," and to "deny admission to criminal offenders"); *see also* Ewald, *supra* note 12, at 86.

179 *See* Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (2012); Ewald, *supra* note 12, at 87.

180 The program was created by the Anti-Drug Abuse Act of 1988 and is operated by the Department of Justice. *See* BUREAU OF JUSTICE ASSISTANCE, PROGRAM BRIEF (July 2002), https://www.ncjrs.gov/html/bja/dfpbc/bja1.html (listing benefits that may be denied include grants, financial aid, contracts, and licenses). The 1992 statute conditioning federal highway funding on states categorically suspending the driver's licenses of people convicted of drug offenses might be another example. *See* Ewald, *supra* note 12, at 86–87.

181 With respect to immigration consequences, see for example *Hinds v. Lynch*, 790 F.3d 259, 264 (1st Cir. 2015) (explaining and endorsing government's argument that a non-citizen removed on the basis of past conviction "is merely being held to the terms under which he was admitted" (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999))); Statement on Signing the Immigration Act of 1990, 2 PUB. PAPERS 1717–18 (Nov. 29, 1990) (stating that new law "provides for the expeditious deportation of

ernment resources to the most deserving.[182] The third is the goal of deterring harmful conduct.[183] And the last is the goal of preventing future bad acts by convicted persons: to protect the public from "dangerous criminal aliens,"[184] to protect federal benefits programs from fraud and abuse,[185] to protect school campuses from criminal conduct,[186] and to protect the franchise from irresponsible voting by felons.[187]

These proffered rationales entail claims to authority (explicit or implied) that fall at different points along the spectrum. A judgment of rights forfeiture is, at base, a judgment of culpability. Only by blameworthy conduct can a person forfeit rights. CCs that claim authorization on this basis therefore belong close to the punishment end of the spectrum. The same is true of explanations that invoke the state's power to allocate benefits to the most deserving; they rely on a judgment of desert. The claim of authority from deterrence is more difficult. States do have regulatory authority to threaten penalties in order to deter harmful conduct, and not all such penalties require or reflect a judgment of blame. But when a penalty is

---

aliens who, by their violent criminal acts, forfeit their right to remain in this country"). With respect to felon disenfranchisement, see for example *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (endorsing state's interest in "excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws"), and *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) ("A man who breaks the laws . . . could fairly have been thought to have abandoned the right to participate in further administering the [social] compact.").

182 *See, e.g.*, Students for Sensible Drug Policy Found. v. Spellings, 523 F.3d 896, 900 (8th Cir. 2008) (offering "ensuring tax dollars are spent on students who obey the laws" as one purpose of law disqualifying people with drug convictions from federal student aid); Turner v. Glickman, 207 F.3d 419, 424 (7th Cir. 2000) (offering "curbing welfare spending" as one goal of law disqualifying persons convicted of drug offenses from receiving welfare).

183 *See, e.g.*, *Students for Sensible Drug Policy Found.*, 523 F.3d at 900 (offering deterrence, or the promotion of "a drug-free society," as a purpose of bar to student aid); *Turner*, 207 F.3d at 424 (offering "deterring drug use" as purpose of welfare bar).

184 *See, e.g.*, Demore v. Kim, 538 U.S. 510, 515 (2003) (offering "protecting the public from dangerous criminal aliens" as one of two rationales for mandatory immigration detention scheme); *Hinds*, 790 F.3d at 264 ("When noncitizens are removed because they have committed serious state or federal offenses, Congress has simply determined that those aliens are among the categories of noncitizens who pose a particular concern to the nation's welfare."); Statement on Signing the Immigration Act of 1990, *supra* note 181 (stating that new law "provides for the expeditious deportation of aliens who . . . jeopardize the safety and well-being of every American resident"); Hernández, *supra* note 72, at 1360–79 (describing the "common roots" of contemporary penal and immigration laws).

185 *Turner*, 207 F.3d at 423 ("Section 862a attempts to reach the problem of fraud by permanently disqualifying individuals convicted of certain drug-related felonies from receiving benefits under either the federal foodstamp program or the TANF program.").

186 *Students for Sensible Drug Policy Found.*, 523 F.3d at 900 (proffering "school safety" as one purpose of conviction-based bar to federal student loans).

187 *See* Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (endorsing state's interest in excluding people with felony convictions from the franchise because they, "like insane persons, have raised questions about their ability to vote responsibly").

attached to conviction, it necessarily reflects the judgment of culpability that conviction entails. Therefore, to the extent that deterrence is the primary rationale for a given CC, that CC also belongs on the punishment side. The last rationale—the need to prevent dangerous people from committing future harm—entails a judgment of relative future risk, and CCs that invoke it belong at the prevention end of the spectrum.

As a whole, then, CCs are weighted toward the preventive end of the punishment-prevention spectrum. Only a very few explicitly invoke a judgment of culpability as the ground of the deprivation. States sometimes defend a handful of others on the basis of desert. But in general, states defending CCs claim the authority to restrict individual liberty on the basis of a predictive judgment of risk.

A skeptical reader may object at this point that the state's purported rationale for any given CC (and the claim of authority it entails) is meaningless. It might be pretextual, a mere mask for punitive aims. Even if not, it is most likely a post hoc rationalization that is more fiction than fact. The objection has some force. A few of the risk rationales for CCs do seem patently pretextual. It strains credibility, for instance, that people with old convictions are a major threat to the integrity of the franchise. It is also true that legislative intent is always amorphous, unknowable in any ultimate sense.

It does not follow, though, that the proffered risk rationales are meaningless. First of all, the fact that a risk rationale is dubious does not necessarily mean that it masks a judgment of blame. The legislature that enacted a felon disenfranchisement law, for example, might simply have wanted to keep certain political demographics out of the ballot box. Without further evidence of an alternate intent, the only clear conclusion to be drawn from a dubious risk rationale is that the measure at issue is a questionable means of preventing harm.

More fundamentally, the state's claim to authority itself matters—however dubious its logic—because it communicates a judgment of future risk. According to the explanation that states themselves proffer, CCs constitute a broad preventive scheme that restricts the autonomy of nineteen million people on the basis that they are likely to commit future crimes. To join Jennifer Daskal in borrowing Minority Report terminology, they are "pre-crime" restraints.[188] For the most part, moreover, they are incapacitative: They aspire to avert harm not by influencing people's choices, but by eliminating them. An ex-felon cannot commit a new crime on the job if he cannot get the job. A former sex offender cannot molest a child if he is not allowed near children. CCs are explicitly designed to operate by blunt force. They fence certain people out of certain situations, or they subject people, by means virtual or physical, to state supervision. The proffered logic of CCs is the incapacitative logic of managing contagion and dangerous non-agents: exclusion and control.[189] At the societal scale, this logic has alarming cumu-

188 Daskal, *supra* note 15, at 374–76.

189 Some CCs also deploy deterrent threats as a means of restraint. Sex offender registration regimes, for example, threaten criminal penalties for violations, as do laws prohibit-

lative effect. Taking conviction as a permanent risk status, CCs demote broad classes of citizens—albeit citizens who have erred—to criminals, whose defect is innate. And to the extent that our law and society generally eschew the predictive restraint of people who are self-determining agents, CCs suggest a verdict of lesser personhood for those with past convictions.

A handful of scholars have made this point about CCs over the years. Joel Feinberg, discussing a New York statute invalidating the driver's licenses of people convicted of subversive activity, wrote that "victims of a cruel law understandably claim that they have been punished, and retroactively at that. Yet strictly speaking they have not been *punished*; they have been treated much worse." [190] Andrew von Hirsch and Martin Wasik noted that CCs violate the legal tradition of "forbearance" from intervening to prevent an intentional bad act.[191] And Alec Ewald has described CCs as "[l]oosely labeling former offenders as lifelong threats rather than rights-bearing, autonomous persons."[192] "It is as if by commission of crime a person surrenders autonomy and returns to the status of a child—deserving only to be disciplined, guided, and restrained as the state . . . sees fit."[193]

The nascent legal literature on CCs, however, has largely omitted the point. Predictive logic is the critical difference between today's CCs and the civil death of old. Civil death was imposed and recognized as a sanction for culpable conduct.[194] The punishment was harsh, but it asserted authority on the basis of the offender's past choice, not his predicted future acts. So while it is useful and important to recognize that CCs work a "general loss of legal

---

ing possession of firearms by felons. To some degree, then, these CCs do acknowledge and leverage the agency of those subject to them. On the other hand, these are only components of larger regimes that fundamentally operate by exclusion. Sex offenders may be held in custody if they cannot procure housing that complies with registration regime requirements; on the outside, school administrators, employers, and residents of certain neighborhoods keep them at bay. Firearm vendors conduct background checks to avoid selling to felons. These regimes use a mix of incapacitative and deterrent strategies to restrain and exclude the targeted group. Many thanks to Jeremy Waldron for pointing this out.

190 Feinberg, *supra* note 12, at 414.

191 von Hirsch & Wasik, *supra* note 12, at 607–08 ("Such forbearance reflects the assumption that persons are agents, not beasts—beings who are capable of deciding whether or not to act, and of considering reasons (both of a moral and of a prudential character) in so deciding.").

192 Ewald, *supra* note 12, at 102.

193 *Id.* at 103–04.

194 *See, e.g.*, Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 359 (2012) ("[D]isenfranchisement law originally resulted from specific violations of the moral code rather [than] the general *status* of felon . . . ."); Chin, *supra* note 8, at 1791 ("As one Ohio court recognized in 1848, '[D]isabilities . . . imposed upon the convict' are 'part of the punishment, and in many cases the most important part.'" (alterations in original) (quoting Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848))); Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 991 (1970) ("In all cases civil death statutes have been considered penal and have been strictly construed.").

personality and status" akin to the civil death of old, it seems equally significant that they have done so *sub silentio*, not as punishment for a culpable choice, but as a mode of aggregate preemptive restraint and control.[195] They are a feature of the preventive state. As is true of other forms of predictive restraint, CCs do not reflect and empower choice; they ignore it. They treat persons not as responsible beings but as risk factors.

With these facts in mind, we return to the central question. When a legislature purports to attach "non-punitive" consequences to conviction, how should constitutional law respond?

C. The Punishment Reflex

There is a critical reflex to classify everything on the punishment-prevention spectrum as punishment, because that is the arena in which we have clear, specific constitutional constraints.[196] It is like looking for lost keys under the streetlight. But this is not the only possible response, and it is not necessarily the right one. Carol Steiker observed in 1999 that the reflex can have a price: it obscures the judgments that preventive regimes entail, and impedes the development of rational legal frameworks to guide them.[197] As the preventive state grows in scope and complexity, these costs increase.[198] Classifying CCs as "punishment" has particular costs.

1. Downsides of the "Punishment" Category

The first set of costs relate to the punishment classification itself, not the character of CCs. In short, characterizing CCs—whatever their character—as "punishment" risks legitimation without the benefit of effective constraints.

Because punishment is a presumptively permissible consequence of conviction, to categorize CCs as punishment is to bestow a presumption of permissibility. Every person subject to CCs has been convicted of a crime. The determination of culpability that is the necessary and (arguably) sufficient condition for punishment has already been made. A person subject to CCs might object to their scope, but she cannot object, as a matter of first principles, to being punished. This is especially true if her sentencing judge has already considered the effect of CCs in imposing her sentence, as the proposed Model Penal Code provisions would have her do. If CCs are *not* pun-

195 Chin writes that "convicted persons suffer a general loss of legal personality and status, which, as *Trop* and *Weems* suggest, is punishment." Chin, *supra* note 8, at 1825. In those cases, however, the measures at issue were clearly inflicted as punishment. The cases do not suggest that *any* loss of status is punishment.

196 *See* Steiker, *supra* note 10, at 778–79.

197 *Id.* at 776 (noting that the problem of "identifying those preventive practices and policies that are 'really' criminal punishment" was obscuring the problem of elaborating limits of the "preventive state"); *see also* Slobogin, *supra* note 15, at 62 (arguing "that a jurisprudence of dangerousness is an essential aspect of regulating government power"); Steiker, *supra* note 10, at 774 (noting that courts and commentators had "not yet even recognized this topic *as* a distinct phenomenon either doctrinally or conceptually").

198 *See* Steiker, *supra* note 10, at 777–78.

ishment, on the other hand, critics retain the baseline argument that there is no ground for the deprivation whatsoever. At the very least, they can argue that the state bears the burden of demonstrating that there is.

The possibility of subtly normalizing and entrenching CCs is all the more concerning because, in point of fact, the constitutional constraints on punishment are limited. The Ex Post Facto Clause provides diminishing returns over time, as retroactive application of a given CC becomes less important than its prospective effect. The Double Jeopardy Clause does not prohibit all "double punishment," only punishment that exceeds legislative intent.[199] As for the Eighth Amendment, courts are notoriously passive in enforcing it as a substantive limit.[200] Classifying CCs as punishment might not result in much (or any) reduction in their scope.

Procedurally, the punishment approach does not trigger significant additional protections. All of the prerequisites to conviction by trial already apply. The only new procedural protection would be the due process and Sixth Amendment right to pre-plea notice of the civil disabilities that a plea would trigger. This seems valuable and necessary as a matter of basic fairness.[201] Yet, whether the Constitution requires pre-plea notice of potential CCs does not actually depend on whether they are punishment. There are other routes to the notice goal.[202]

As a tactical matter for CCs critics, then, the punishment approach could be counterproductive. At best, it offers limited returns. We could, of course, strive to make constitutional constraints on punishment more robust. If the Eighth Amendment were held to prohibit any punishment in excess of desert, were applied to CCs, and were perfectly enforced, it would eliminate most CCs. That might resolve the legitimation concern. But that outcome is unlikely. And if there is ever a basis for the state to consider conviction as evidence of future risk, it is also irrational, as the next Sections will discuss.

2. Costs of Convergence

A second set of costs relates to the character of CCs themselves. To the extent that the state claims authority to impose CCs on the basis of future risk, subjecting them to legal regimes designed around culpability instead causes problems. It masks the state's risk judgments, which results in inap-

199 *E.g.*, Missouri v. Hunter, 459 U.S. 359, 366 (1983).

200 For an argument that the Court should never have read a proportionality rule into the Eighth Amendment in the first place, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 57–61 (2014).

201 On the other hand, pre-plea notice of potential CCs might be less valuable than it first appears. It is not clear how much of a difference it will make to most defendants, given their relative bargaining power and the difficulty of factoring complex future disabilities into decisionmaking. Furthermore, the right of notice is hard to fully implement. CCs differ wildly across jurisdictions; the disabilities that attach by virtue of past conviction will depend on where a person goes and what life path she takes. They may not be fully knowable at the point of a plea.

202 *See infra* notes 234–38 and accompanying text.

propriate procedures and constraints. It renders sentencing incoherent. Simultaneously, it precludes the development of a rational legal framework to guide risk-based disabilities. As Paul Robinson has argued in other contexts, applying culpability rules to putative risk-based restraints prevents us from doing either punishment or preventive restraint effectively.[203] That ultimately has a profound cost in liberty and security alike.

a. Undermining Punishment

To begin with, categorizing CCs as punishment puts sentencing judges in a difficult position. They are charged with imposing a sentence that is not disproportionate to the crime. The problem is that they do not exercise control over CCs. Legislatures do.[204] Even if sentencing judges could identify every CC a conviction would trigger, they could not easily predict or calibrate their future effects for the person to be sentenced.[205] A sentencing judge therefore cannot both "include" all CCs in the punishment she imposes and also ensure that it is proportionate to the offense. To demand that judges do so is to require that they either abandon the ideal of desert proportionality or lie about what they are doing.[206]

Paul Robinson has made a similar point with respect to risk-based mandatory minimums and three-strikes laws. Because the criminal justice system is actually engaged in "cloaked" preventive detention when it imposes such measures, he argues, it fails to impose sentences that reflect culpability—and usually this means they "exceed the punishment deserved."[207] This is significant on deontological grounds, but also because the deterrent efficacy of criminal law depends on its "moral credibility."[208] As it strays farther from principles of desert, it loses its power to influence behavior and shape

203 *See, e.g.*, Robinson, *supra* note 13, at 1432 (arguing that deploying criminal justice system for preventive ends both "perverts the justice process" and creates "a costly yet ineffective preventive detention system").

204 Current reform proposals would empower sentencing judges to exercise some control over existing CCs in their jurisdictions, but such control is necessarily limited. Sentencing judges will not be able, for example, to control CCs imposed by legislatures in other jurisdictions. *See, e.g.*, MODEL PENAL CODE: SENTENCING §§ 6x.04–.05 (AM. LAW INST., Tentative Draft No. 3, 2014) (authorizing sentencing judges to grant relief from civil disabilities imposed by the laws of their own state).

205 *See* von Hirsch & Wasik, *supra* note 12, at 617 ("If a sanction can only poorly be calibrated, it comports badly with this [culpability] conception of punishment.").

206 There are other legal and policy problems with courts "including" CCs as part of the punishment they impose. Federal law requires that the *sentence* be proportionate to the offense; the Sixth Circuit has recently held that if a court reduces a sentence to account for the severity of CCs, it violates that mandate. *See* United States v. Musgrave, 761 F.3d 602, 608–09 (6th Cir. 2014). Policy concerns include the risk of socioeconomic bias in favor of more privileged defendants who have most to lose in the civil sphere, and who, with the benefit of better lawyers, will be most likely to advocate effectively for sentence reductions on the basis of potential CCs. *Id.*

207 Robinson, *supra* note 13, at 1435–36.

208 *Id.* at 1443–44.

community norms. Such practices ultimately undermine the power of the criminal law to prevent future harm.[209] To the extent that instructing judges to consider risk-based CCs as a part of the punishment for an offense precludes them from crafting sentences that reflect culpability, it furthers these effects. On the other hand, it does nothing to ensure the process and limitations that, as a logical matter, should attend preventive restraint.

b. Poor Preventive Restraint

Criminal institutions are poorly designed for risk adjudications. As discussed above, an adjudication of the permissibility of any risk-based restraint would ideally involve expert evidence and an evidentiary standard that relates to the degree and likelihood of the harm, as well as the availability of less restrictive alternatives. The process should include periodic review. Criminal trials and sentencing procedures are not designed to do any of that.[210]

In terms of substantive oversight, classifying CCs as punishment triggers constitutional limitations designed to govern judgments of culpability rather than judgments of risk. This makes them irrational constraints for preventive regulation. Most obviously, the Ex Post Facto Clause would bar the retroactive application of CCs classified as punishment. But if, for example, there are any circumstances in which a sex-offense conviction, or series of convictions, is a sufficiently accurate predictor of future risk to justify some ongoing monitoring of the person convicted, there is no reason that only people convicted after the law's passage should be subject to it. An Ex Post Facto bar means that the state cannot monitor people with very serious past convictions—but it can monitor anyone at all convicted in the future, however trivial the offense.[211] It is both too restrictive and not restrictive enough. The (loose) Eighth Amendment requirement of desert proportionality is an equally irrational limit on predictive regulation.

Conversely, classifying CCs as punishment also precludes the development of constitutional constraints on preventive regimes. It precludes a means-end analysis that questions whether a given CC is a reasonable means of mitigating danger, taking into account the severity, likelihood, and imminence of the feared harm.[212] It precludes a requirement that states apply the

209 *Id.*

210 *Cf. id.* at 1450–52 (noting that when judges attempt to craft sentences on the basis of future risk, they must engage in the "grossest sort of speculation" about future danger, which "guarantees errors of both inclusion and exclusion").

211 The Maryland Supreme Court recently held that registration constituted punishment, and people with even serious convictions that predate the law have been removed from the registration rolls. *See* Ian Duncan, *Court Ruling Upends Maryland's Sex Offender Registry*, THE BALT. SUN (Nov. 1, 2014), http://www.baltimoresun.com/news/maryland/crime/bs-md-sex-offenders-20141101-story.html.

212 DERSHOWITZ, *supra* note 15, at 224 ("Primary among the factors that should be considered are the severity, certainty, and imminence of the threat, on the one hand, and the nature, scope, and duration of the contemplated preemptive actions, on the other.").

least restrictive measure reasonably available to protect the public.[213] And it precludes a rule that criminal law must be the first line of defense against criminal acts by responsible agents. Cast as punishment, CCs escape the procedures and limitations that should govern risk-based restraints.

Moreover, classifying CCs as punishment obscures the fact that the risk judgment that purportedly animates them might reflect three possible premises: (1) that people with past convictions are especially dangerous; (2) that they have diminished liberty rights, so that even a slight risk warrants restraint; or (3) that they have less rational or moral agency than other people, such that the threat of punishment cannot be trusted to prevent their future misconduct, and a blunter form of restraint is necessary. Or CCs might simply result from political scapegoating and lack any basis in rational judgment at all. Each of these possibilities is alarming, and to categorize CCs as part of punishment is to ignore them. Worse—the law's failure to confront these implicit judgments effectively endorses them.

c. Losing Agency

Stated most generally, the cost of classifying CCs as punishment is that, by failing to distinguish between culpability- and risk-based deprivations, it contributes to the general convergence of punishment and predictive control. Today's CCs are the product of a wave of overlapping criminal law and regulatory reforms in the 1980s and 1990s. The narrow question of how we classify them belongs to the larger question of how we understand the relationship between criminal punishment and predictive regulatory governance. To classify CCs as punishment is unlikely to result in much meaningful oversight. Instead, it promotes the very entanglement of punishment and preemption that catalyzed the explosion of CCs in the first place. That obscures the deep difference between them, and makes it harder to ensure that criminal law is indeed the first line of defense against future bad acts. The ultimate cost is that we might unwittingly sacrifice the primacy of criminal law, the value it attaches to human choice, and the freedom it protects.

D. The Alternative: Uncloaking Preventive Restraint

There is a better alternative to the punishment reflex. Courts should classify restrictive measures according to whether they claim primary authorization from a judgment of culpability or a judgment of risk, and then apply the appropriate procedures and constraints. In other words, if the primary judgment behind CCs is a judgment of risk, it should be evaluated as such. As Robinson has argued, separating judgments of risk from judgments of desert would further a more just and effective criminal law, more accurate predictive restraint with less cost to liberty, and a more honest debate in each

213 *See* ASHWORTH & ZEDNER, *supra* note 15, at 168–70, 254 (suggesting "some preliminary constraining principles" for preventive restraint); Robinson, *supra* note 13, at 1446–47, 1450–53.

sphere.[214] The important thing is that *both* punishment and preventive restraint be subject to meaningful constraints, appropriate to the grounds of the deprivation. Acknowledging the existence of predictive restraint is the first step toward that result.[215]

As a doctrinal matter, some test is necessary for courts to assess whether a given measure claims primary authorization from a judgment of culpability or future risk. This is not the place to propose or defend a particular doctrinal test, but the simplest option is for courts to essentially defer to the purported grounds of any given deprivation (risk or culpability), with some review for pretext.[216] This is not a perfectly "accurate" sorting mechanism, in the sense that it would classify some measures as preventive restraint that have punitive elements, and vice versa. But given the realities of mixed judgments, no sorting mechanism can do otherwise. The grounds-of-the-deprivation approach has the virtue of clarity. It also recognizes that predictive restraint is sometimes permissible (on the basis of risk alone) as a first step toward coherent constraints.[217]

This approach would classify all deprivations that claim primary authorization from culpability as "punishment." Those would include all aspects of criminal sentencing, unless the legislature explicitly creates a "two-track" system to impose separate, risk-based restraints at the time that punishment is announced.[218] It would also include any restraint that seeks to prevent a

214 *See* Robinson, *supra* note 13, at 1455–56.

215 *See id.*; *see also* DERSHOWITZ, *supra* note 15, at 56–57 (noting that "no jurisprudence governing preventive confinement has ever been articulated," partly because many scholars "simply deny that preventive intervention, especially preventive confinement, really exists, or . . . deny [its] legitimacy, thus obviating the need for a theory or jurisprudence"); Steiker, *supra* note 10; Steiker, *supra* note 11.

216 This is related to but distinct from the intent inquiry that lies at the core of the Court's current "punishment" test.

217 In my view, other proposals for how to draw the punishment/prevention line are ultimately impracticable. The "effects test" favored by many CCs scholars is, as discussed above, theoretically incoherent and practically unworkable. A second possibility is to classify any serious deprivation triggered by past conviction as punishment. This is what Justice Stevens has suggested. *See* Smith v. Doe, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting) (arguing that any deprivation of liberty is punishment if it "(1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty"). This proposal is both over- and under-inclusive. The most plausible alternate approach is to classify any deprivation that functions as a moral sanction as "punishment," on the logic that any such deprivation should require authorization from culpability and be subject to culpability constraints. This is essentially the approach that Steiker advocates. *See* Steiker, *supra* note 11, at 810–11, 816–19 (proposing punishment test and applying it to case studies). The problem is that it is extremely difficult to determine what operates as a moral sanction. Steiker's suggested refinements help, but do not eliminate the difficulties. Additionally, if such measures are classified as punishment but perceived by courts as preventive restraints, judges might resist enforcing the desert cap, with the distorting effects discussed above.

218 A number of European countries have developed such systems. *See* Michele Caianiello, *Introduction*, *in* PREVENTING DANGER, *supra* note 13, at xxvi–xxviii (describing forms of "post-sentence" detention); Jörg Kinzig, *The ECHR and the German System of Preventive*

future harm, but claims primary normative authorization from the culpable intentions of the person who poses the threat.[219] For this approach to function well, of course, the law must actually enforce a desert-proportionality constraint on punishment.

This approach would categorize most CCs, on the other hand, as preventive restraint. Not all of them: CCs explicitly designed as sanctions for crime would qualify as punishment.[220] CCs in the "middle ground" on the punishment-prevention spectrum could go either way; for these, the classification would depend on the particular legislation at issue and the grounds for intervention that the government asserts in litigation. (The doctrinal test to identify the "primary" claim of authority could either require the government to choose or require the court to identify one.) But most CCs, because they invoke a judgment of future risk as primary authorization for interference in individual lives, should be categorized as preventive restraint.

One point that bears mentioning is that the nature of today's CCs may change. Legislative reform may succeed in empowering sentencing judges to waive certain CCs when imposing a sentence, as recent proposals advocate.[221] In a few jurisdictions, this is already a reality.[222] Such reform effec-

---

Detention: An Overview of the Current Legal Situation in Germany, *in* PREVENTING DANGER, *supra* note 13, at 71–96.

219 This kind of restraint might be conceptualized as punishment for inchoate crimes (as it currently is), as "defensive force" (as Kimberly Kessler Ferzan advocates), or as "punitive restraint" (the terminology that Michael Corrado prefers). *See supra* note 169. In each framework, it is a judgment of culpability that authorizes state intervention. To classify all such measures as punishment is not to prohibit deploying them for preventive purposes, or adjusting them in consideration of preventive goals. It simply means that desert, and the other constraints appropriate to forms of state censure, provide the outer limiting framework. Whether we *should* seek to intervene on the basis of culpability in order to pursue incapacitative ends, and how, is a difficult question beyond the scope of this paper. The central problem, as suggested above, is that the normative criteria governing the quantum of punishment or prevention that is justified—a person's degree of culpability or dangerousness, respectively—do not generally align, such that culpability-authorized restraint will rarely provide effective incapacitation, and may tempt authorities to forego the culpability constraint in order to achieve greater protection. *See* Darin Clearwater, *'If the* Cloak *Doesn't Fit, You Must Acquit': Retributivist Models of Preventive Detention and the Problem of Coextensiveness*, 9 CRIM. L. & PHIL. (forthcoming 2015) (labeling this "the problem of coextensiveness" and exploring it in detail).

220 *See supra* note 180.

221 *See* UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (authorizing sentencing courts to hear petitions for relief from certain CCs); MODEL PENAL CODE: SENTENCING §§ 6x.04(2) (AM. LAW INST., Tentative Draft No. 3, 2014) (authorizing sentencing judges to hear petitions for relief from certain CCs prior to termination of person's sentence); *id.* § 6x.05 (establishing related process for "orders of relief" for persons convicted in other jurisdictions, or who have completed a criminal sentence); ABA STANDARDS, *supra* note 3, Standard 19-2.5(a) & cmt. (directing legislature to "authorize a court, a specified administrative body, or both" to waive, modify, or grant "relief" from CCs, at time of sentencing or later); *see also* Love, *supra* note 83 (explaining these provisions).

tively vests sentencing judges with authority to determine which CCs apply to a given person. This complicates the classification paradigm.

To the extent that this reform vests sentencing judges with control over CCs pursuant to their general sentencing power, it renders CCs indistinguishable from other risk-oriented sentencing tools.[223] They are no longer collateral in any meaningful sense. They simply become components of the sentence. The classification framework proposed here would classify such civil disabilities as punishment, subject to punishment constraints.[224] Alternately, to the extent that legislatures instruct sentencing judges to undertake a risk adjudication entirely distinct from questions of desert, they arguably create a separate, civil process, and vest sentencing judges with a form of civil authority.[225] For the reasons discussed above and below, this might be the preferable approach.[226] In this scenario, CCs remain collateral to the criminal sentence, claim primary authorization from a judgment of future risk, and should be classified as preventive restraints and constrained accordingly.

The central point here is that courts have reached a defensible result in finding most CCs not to constitute punishment. Where they have gone very wrong is in concluding that, as regulation, CCs are benign. That CCs are

222 *See* COLO. REV. STAT. ANN. §§ 18-1.3-107, 213, 303 (West 2015) (authorizing sentencing courts to issue orders of "collateral relief" under certain circumstances); N.J. STAT. ANN. §§ 2A:168A-7–12 (West 2015) (same); N.Y. CORRECT. LAW § 702 (McKinney 2015) (authorizing sentencing courts to issue "certificates of relief from disabilities" under certain conditions); VT. STAT. ANN. tit. 13, § 8010 (effective Jan. 1, 2016) (West 2015) (enacting U.C.C.A., authorizing sentencing courts to issue orders of "limited relief" from certain mandatory CCs, under certain conditions).

223 These include enhancement or reduction of punishment on the basis of risk assessment measures, risk-oriented conditions of probation, suspension of licenses, and civil disabilities already within the power of sentencing judges to impose, or, arguably, recidivist enhancements.

224 *Accord* Love, *supra* note 83, at 272 (observing that CCs subject to such control "are as much a part of the court's sentencing function as a fine or prison term," such that "a court ought to evaluate [them] in terms of the same considerations of proportionality and fairness as those that govern the sanctions the court itself imposes"). Oddly, she then concludes that this reform "convert[s] collateral consequences from punishment to regulation," ostensibly on the basis that it renders them individualized rather than categorical. *Id.* at 252, 280. Given that punishment is often individualized and regulation often categorical, the assertion is puzzling. In my view, this reform instead converts CCs from categorical regulation to individualized punishment.

225 The proposed Model Penal Code provisions contain instructions of this sort. *See* MODEL PENAL CODE: SENTENCING § 6x.04(2)(c) (AM. LAW INST., Tentative Draft No. 3, 2014) (instructing sentencing judges to grant petition for relief if petitioner demonstrates by clear and convincing evidence that disability at issue "imposes a substantial burden" and "public-safety considerations do not require mandatory imposition" of the disability). On the other hand, the provisions also instruct sentencing judges to consider CCs a part of punishment and ensure that the "total package of sanctions" does not exceed an offender's desert. *Id.* § 6.02 cmt. It is unclear how judges should, or can, reconcile the two mandates. *See infra* notes 242–46 and accompanying text.

226 *See supra* notes 206–15 and accompanying text; *infra* notes 244–46 and accompanying text.

predictive risk regulations does not make them innocuous. On the contrary: it means that they contravene the respect for individual agency that criminal and constitutional law proclaim. What has been lacking is a robust jurisprudence of preventive restraint. The last Part explores what oversight of CCs, classified as preventive restraint, might look like.

IV. CCs as Preventive Restraint

Because preventive restraint is an under-theorized form of social control, and because scholars who have addressed contemporary CCs as a composite phenomenon have generally advocated the punishment approach, there has been no in-depth effort to describe how constitutional law and criminal procedure should constrain CCs if they are understood instead as predictive restraints.[227] This Part makes a first attempt, limiting the discussion to federal law and to arguments that apply to CCs as a whole.[228] It argues that, procedurally, the Sixth Amendment requires notice of certain CCs regardless of their classification as predictive restraint, and that sentencing judges should consider CCs as *context* for the punishment they impose, but not as part of the punishment itself. In terms of substantive constraint, any rational oversight should require the state to demonstrate that a challenged CC is an appropriately tailored means of preventing future harm, given its cost in liberty. The question is whether the Constitution requires such an analysis. This Part explores two arguments that it does—in doctrinal terms, that regulation by past-conviction status warrants heightened review for purposes of equal protection or substantive due process. A few CCs might survive heightened scrutiny. Most, however, would not.

---

227 *See* Ashworth & Zedner, *supra* note 15, at 1 ("Preventive endeavours are ubiquitous, but they have yet to be mapped, analysed, or rationalized."). Scholars have done related work, however. *See, e.g.*, Love et al., *supra* note 4, §§ 3.1–.23 (canvassing all constitutional grounds for challenging CCs and summarizing success of such challenges in the courts); Aukerman, *supra* note 30 (exploring constitutional constraints on conviction-based employment bars); Logan, *supra* note 70 (exploring constraints on sex offender registration and commitment laws); Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & Econ. Dev 533, 535 (2014) (developing proposed framework for constraining civil immigration detention).

228 It does not discuss constitutional provisions applicable to specific categories of CCs. Considered individually, some CCs infringe established rights. *See, e.g.*, Doe v. Harris, 772 F.3d 563, 583 (9th Cir. 2014) (upholding grant of preliminary injunction against sex offender registration requirements alleged to violate First Amendment). State constitutional law is an additional, and fruitful, terrain for constitutional litigation of CCs on non-punishment grounds, especially where state constitutions include a right to reputation, privacy, or employment. *See, e.g.*, Nixon v. Commonwealth, 839 A.2d 277, 284–86 (Pa. 2003) (holding conviction-based employment bar to violate "right to engage in a common occupation" protected by Pennsylvania's Constitution); Archer & Williams, *supra* note 73, at 528 (arguing that "litigation under state law theories provides the best hope for relief"). An evaluation of state constitutional frameworks is beyond the scope of this paper, however.

A. Procedural Oversight

To classify CCs as predictive restraints rather than punishment does not render them irrelevant to the criminal process. They are, after all, consequences of conviction.

For that reason, courts should interpret the Sixth Amendment and due process to require that defense counsel inform her client of the serious CCs that her conviction might trigger. This does not and should not turn on whether CCs are "punishment."[229] It is true that, before 2010, the Supreme Court had "declined to decide" whether the Sixth Amendment required defense counsel to inform her client of potential collateral consequences of a plea, and the lower courts had uniformly held not.[230] But *Padilla* rejected "that categorical approach,"[231] at least with respect to deportation.[232] Lower courts, and eventually the Supreme Court, should now forsake the distinction between "collateral" and "direct" consequences in this context altogether. At base, the notice doctrine derives from the due process requirement that a guilty plea be "intelligent" and "voluntary," which depends in part on whether an accused person's counsel has provided the effective assistance the Sixth Amendment guarantees.[233] The question of whether it should extend to other CCs therefore depends on what effective assistance entails and the extent to which ignorance of a given CC might undermine the voluntariness of a plea. That CCs themselves do not constitute "punishment" is irrelevant.[234]

---

229 Jenny Roberts has been making this point for some time. *See, e.g.*, Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 684 (2008).

230 Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013).

231 *Id.*

232 Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance'. . . ."); *Chaidez*, 133 S. Ct. at 1110 (clarifying this point).

233 *See, e.g.*, *Padilla*, 559 U.S. at 369 (holding that the Sixth Amendment requires defense counsel to advise clients of "clear" immigration consequences of conviction); Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("[T]he voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" (citing McMann v. Richardson, 397 U.S. 759, 771 (1970))); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding, on procedural due process grounds, that guilty pleas must be knowing and voluntary); *see also* LOVE ET AL., *supra* note 4, § 4.1l; Margaret Colgate Love, *Collateral Consequences after* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105–12 (2011) (making this point, and arguing that the Sixth Amendment requires counsel to provide notice of consequences that are "severe and certain, and of predictable importance to the client," whatever their source).

234 *Cf.* Hinds v. Lynch, 790 F.3d 259, 266 (1st Cir. 2015) ("[T]he fact that the Court or a legislative body believes that a consequence is significant enough that it requires some notice to the defendant, does not transform that consequence into a criminal punishment."). This legal interpretation is not inconsistent with Colleen Shanahan's *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1392 (2012) (arguing that Sixth Amendment requires notice of consequences

Sentencing judges, for similar reasons, should always consider potential CCs when crafting and imposing punishment—but not, as the ABA and the ALI propose, as *part* of the punishment for an offense.[235] They should instead consider CCs as *context* for the punishment. It is important that they do. To ignore CCs is to ignore what may be the most important consequence of conviction for the person sentenced. If the goals of punishment include deterring her from future crimes, or facilitating her rehabilitation, consideration of CCs is essential. A judge cannot assess what kind of sentence will best assist a person in developing a stable, productive life without considering her circumstances and the obstacles she will confront. Likewise, it is impossible to analyze what sentence is sufficient to deter a person from future crimes without considering what her future life circumstances will be. Throughout, though, judges should maintain a clear conceptual distinction between the sanctions they impose as punishment and restraints imposed for other reasons. This is necessary both for judges to craft punishment that reflects offenders' fault and also to ensure that CCs are subject to independent constraints.

As to the question of what procedure the Constitution requires before CCs themselves may be imposed, the answer—limiting the inquiry to CCs triggered automatically by conviction—is nothing. The Supreme Court considered this question in *Connecticut Department of Public Safety v. Doe*.[236] The *Connecticut* respondent was required to register as a sex offender on the basis of a prior conviction.[237] He argued that procedural due process entitled him to a hearing to contest his dangerousness.[238] The trouble was that the statute did not condition registration on dangerousness.[239] It was premised on conviction alone.[240] And "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme."[241] The real problem with the registration statute, as the Court hinted, was that it claimed authority to restrain people on the basis of future risk, yet imposed restraint on a basis other than individual dangerousness.[242] This is a substantive problem, not a procedural one. As the Court explained, "States are not barred by principles of '*procedural* due process' from drawing such classifications."[243]

---

that present "significant entanglement" of criminal and civil law), or Brian Murray's *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1179 (2015) (arguing that the judiciary and prosecutors must play a larger role in ensuring adequate notice of CCs).

235 MODEL PENAL CODE: SENTENCING §§ 6x.02(4) & cmt. f (AM. LAW INST., Tentative Draft No. 3, 2014) (instructing judges to consider CCs as part of "total package of sanctions" that constitutes an offender's punishment).

236 538 U.S. 1 (2003).

237 *Id.* at 5–6.

238 *Id.* at 6.

239 *Id.* at 7.

240 *Id.*

241 *Id.* at 4.

242 *Id.* at 8.

243 *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (plurality opinion)).

Their constitutionality "must ultimately be analyzed in terms of substantive, not procedural, due process"[244]—an analysis the next Section will take up.

Procedural limitations on CCs must be developed in the political sphere instead. In policy terms, no civil disability should be imposed on a categorical basis. All CCs should provide for an individualized risk adjudication that explicitly balances public safety concerns against individual liberty interests, and the adjudication should be subject to periodic review. This suggests that it ought not to be merged with sentencing.[245] Legislatures might instead create a separate adjudicatory process.[246] The more clearly it is delineated as a civil adjudication, centered on a risk-liberty tradeoff, the more rational and rigorous a debate policymakers and the public can have about what the terms of the adjudication should be. A compromise option would empower sentencing judges to manage CCs in a process distinct from the imposition of punishment. If we are going to have sentencing judges oversee predictive restraints, better that they do so in an explicitly risk-oriented framework than one bounded in theory by desert and in practice by nothing at all.

B. Substantive Oversight

What substantive constitutional constraints limit preventive regulation by past-conviction status? The conventional wisdom is: very few. Unless a suspect classification or fundamental right is implicated, state regulation gets almost free license. No special constraints apply simply because regulation classifies by past conviction, or because it inflicts restraints on liberty to prevent a future crime. This Section challenges the conventional wisdom. It argues that regulation by past-conviction status warrants heightened judicial review on two related grounds.

---

244 *Id.* (citing *Michael H.*, 491 U.S. at 121) (internal quotation marks omitted).

245 *See* Love, *supra* note 83, at 273 (noting that such judgments may be "more properly those of a legislature or regulatory agency"). There are several additional problems with charging sentencing judges with imposing or waiving CCs. Civil disabilities, as noted above, make poor tools of punishment; they are not easily calibrated to desert. *See supra* notes 206–11 and accompanying text; *see also* MODEL PENAL CODE: SENTENCING §§ 6x.04 cmt. g (AM. LAW INST., Tentative Draft No. 3, 2014) (noting that civil disabilities are inappropriate as tools of punishment and should never be imposed "as a way of enhancing the punishment of any offender"). Judges charged with applying civil disabilities as part of a sentence must therefore either (1) enforce the culpability constraint and waive any disability not clearly deserved (regardless of the public-safety risk) or (2) impose civil disabilities on the basis of risk considerations and forsake the culpability constraint. A separate concern is that including CCs as potential components of a sentence could further complicate plea-bargaining. *See* Love, *supra* note 83, at 250 (suggesting that CCs as sentence components may have a disruptive effect on a system dependent on plea-bargains).

246 The proposed Model Penal Code provisions contemplate a distinct civil process for the issuance of "certificates of relief" from CCs. MODEL PENAL CODE: SENTENCING §§ 6x.06 (AM. LAW INST., Tentative Draft No. 3, 2014); *see also* N.C. GEN. STAT. ANN. § 15A-173.2 (West 2015) (providing that petitions for relief from CCs shall be heard by designated senior and chief judges, who can also delegate their authority to others).

As a preface, it is important to clarify that conviction need not mean legal demotion. Gabriel Chin writes that "after conviction, even years after satisfaction of the sentence, the law regards a person with a record as an appropriate subject for restrictive regulation."[247] This is a simplification. *Legislatures* have deemed such people appropriate subjects for restrictive regulation, and courts, exercising rational basis review, have deferred. This is not the inevitable state of the law. There is no constitutional command that conviction shall result in permanently lesser legal status. The Supreme Court has never held that a person has diminished liberty interests simply by virtue of a past conviction. The Constitution authorizes the limitation of rights during punishment, but not apart from punishment. The colonial-era institution of "civil death" eliminated a convicted person's legal standing, but, as discussed above, civil death was inflicted as punishment. Furthermore, as a constitutional matter, civil death is extinct.[248] As early as 1897, the Supreme Court explained that "the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' . . . could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen."[249] In the U.S. constitutional system, citizenship is "the right to have rights."[250] And "[c]itizenship is not a license that expires upon misbehavior."[251]

The Supreme Court has upheld legislative action that limits the *exercise* of some rights on the basis of past conviction. But the exercise of any right—anyone's rights—may sometimes be limited. A right is only a presumptive guarantee. It is the ability to contest infringements on protected liberties, not immunity from such infringements.[252] Past conviction alone does not dilute one's rights in this sense. To the extent that current statutory and lower-court decisional law presumes that it does, that law conflicts with Supreme Court precedent and a basic premise of the constitutional order, and should change.

1. The Classification Argument: CCs as Caste Legislation

The first doctrinal argument is that regulatory classification by conviction status should trigger heightened review.

Challenges to the fairness of regulatory classifications are adjudicated according to the principles of equal protection. "The Equal Protection

247 Chin, *supra* note 78, at 1832–33.

248 *Id.* at 1789, 1794–97.

249 Hovey v. Elliott, 167 U.S. 409, 444 (1897).

250 Trop v. Dulles, 356 U.S. 86, 102 (1958).

251 *Id.* at 92; *see also* Afroyim v. Rusk, 387 U.S. 253, 262 (1967) ("Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of . . . any other governmental unit."); *id.* at 268 ("We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship . . . .").

252 *See* Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977) (explaining distinction between infringement and violation of rights).

Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[253] The Fifth Amendment imposes the same requirement on the federal government.[254] Because nearly all laws classify in one way or another, the guarantee of equal protection amounts to an amorphous prohibition on illegitimate classifications.[255]

To clarify and implement the prohibition, the Court has developed the familiar framework of three-tiered scrutiny. "Suspect" classifications trigger strict scrutiny.[256] "Semi-suspect" classifications trigger intermediate scrutiny.[257] All other laws are presumed to be constitutional; the challenger can succeed only by demonstrating that the classification bears no rational relation to any legitimate legislative goal (rational basis review).[258]

A few scholars have argued that ex-offenders are a suspect or semi-suspect class by reference to the "traditional" criteria for that designation.[259] Ex-offenders constitute a discrete minority that is politically powerless—despised, in fact. They have been subject to consistent historical discrimination. On the other hand, as these scholars acknowledge, past-conviction status is not immutable in the sense of resulting from circumstances beyond

253 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U. S. 202, 216 (1982)).

254 *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

255 *Cf.* Romer v. Evans, 517 U.S. 620, 631 (1996) (noting that equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons").

256 Strict scrutiny requires the government to demonstrate that the challenged measure is "narrowly tailored" to a "compelling governmental interest." *E.g.*, Johnson v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)). The Court has recognized race, alienage, and national origin as suspect classifications. *See* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 755–61 (2014) (describing evolution of doctrine on this point).

257 "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988). The Court has acknowledged gender and illegitimacy as semi-suspect classifications. *See* United States v. Virginia, 518 U.S. 515, 531, 533 (1996); Trimble v. Gordon, 430 U.S. 762, 766–67, 769 (1977).

258 *Clark*, 486 U.S. at 461.

259 *See* Aukerman, *supra* note 30, at 51–66; Ben Geiger, Note, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191 (2006); Kay Kohler, Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403 (1975); Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2744 (2004). The traditional criteria are whether the targeted group "constitutes a discrete and insular minority," has "suffered a history of discrimination," is "politically powerless," and whether its defining trait is "immutable" or generally irrelevant to legislative objectives. Pollvogt, *supra* note 256, at 742 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985)). *But see* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 717–19 (1985) (arguing that diffuse rather than insular minorities warrant the greatest judicial concern).

one's control.[260] It results, in theory, from culpable conduct. The traditional case is therefore inconclusive.

The Supreme Court's dedication to these criteria is questionable, however. The Court itself has explained the tiers in broader terms. Classifications that "tend to be irrelevant to any proper legislative goal" and instead suggest "the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish" demand strict scrutiny.[261] Classifications that may sometimes be relevant to governing but are also likely to result from stereotype or animus trigger intermediate scrutiny.[262] The rest—classifications that are putatively relevant and not likely to reflect irrational bias—warrant only rational basis review.

Even stated in these broad terms, moreover, the tier framework itself is neither rigid nor inevitable. Its source is the broader concern that some kinds of legislation serve as vehicles of political oppression.[263] In keeping with that concern, the Court has shown particular attentiveness to laws that suggest animus or political exclusion, even when the classifications they entail may not categorically qualify as suspect.[264] These decisions are conventionally said to manifest a fourth tier of scrutiny: rational basis "with bite."[265] Some scholars believe that there are actually many variations on

260 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) (noting that suspect classifications target "groups disfavored by virtue of circumstances beyond their control").

261 *Id.* (noting that "[c]lassifications treated as suspect tend to be irrelevant to any proper legislative goal" and to suggest "the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish"); *see also, e.g.*, *Cleburne*, 473 U.S. at 440 ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . .").

262 *Plyler*, 457 U.S. at 217 n.14.

263 *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "[t]here may be narrower scope for . . . presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution," "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," is "directed at particular religious, or national, or racial minorities," or manifests "prejudice against discrete and insular minorities" (a signal that law might "curtail the operation of those political processes ordinarily to be relied upon to protect minorities") (internal quotation marks omitted)); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

264 *See, e.g.*, *Cleburne*, 473 U.S. at 442–47, 450 (invalidating zoning ordinance that limited where mentally disabled people could live); *Plyler*, 457 U.S. at 224–26, 230 (holding statute that denied public schooling to undocumented children to violate equal protection); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating amendment to federal food-stamp program disqualifying households that included unrelated individuals, intended to prevent "hippies" from participating); *see also* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) (observing that *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor* "established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review").

265 *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759, 776–81 (2011).

rational basis review;[266] others have argued that a "pariah principle" both explains and requires judicial skepticism of laws that encourage "pariah status."[267] Beyond this constellation of decisions, some critics and Justices—most famously, Justice Marshall and Justice Stevens—have advocated eliminating the tiers altogether in favor of a spectrum of scrutiny.[268] As a whole, the debate serves as a reminder that the current three-tier framework is an analytical heuristic, not an end in itself.[269]

Pursuant to the broader logic of the Court's equal protection jurisprudence, regulatory classification by conviction status warrants heightened review, along the lines of what Justice Ginsburg called "skeptical scrutiny," because it suggests unwarranted "class or caste" treatment.[270] (Note that the discussion for the moment is about classification-by-conviction in the abstract, not the classification at issue in a particular law.) It is likely to reflect stereotype and animus. It is also likely to both result from and promote political exclusion. On the other side of the balance, conviction status seems facially relevant to legislative concerns as a measure of desert or risk, or both. Surely the law can look askance at those who have broken it! And yet, if the analysis starts from the premise that CCs are not punishment, it becomes clear that conviction status is far less relevant to legislative goals than it first appears.

To begin with, conviction status is wholly irrelevant as a measure of culpability. Recall that the state's asserted interest, in this regulatory realm, is to protect the public from future harm. It has disclaimed any intent to express blame, or impose just deserts. It purports to have a preventive purpose only. As a measure of desert, conviction status is entirely irrelevant to regulatory goals.

It seems relevant as a measure of risk, but on consideration its relevance in this role is dubious. To have a conviction is not, in itself, a risky "trait." It simply means that that there is an official judgment about you kept in hard

266 *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 231 (2002).

267 Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 274 (1996); *see also* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

268 *See, e.g.*, *Plyler*, 457 U.S. at 231 (Marshall, J., concurring in part) (invoking his repeated calls for "rejecting a rigidified approach to equal protection analysis"); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (lamenting "the Court's rigidified approach to equal protection analysis"); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 493 (2004).

269 *See, e.g.*, William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367 (2014); Goldberg, *supra* note 268, at 493 (describing "the essential concern with class legislation that permeates review of all classifications" and proposing a single standard of review); Pollvogt, *supra* note 256, at 741 (arguing that current tier doctrine is incoherent but reflects values of self-determination and social mobility).

270 United States v. Virginia, 518 U.S. 515, 531 (1996); *Plyler*, 457 U.S. at 217 n.14.

copy in a dank court records room. Nor is the content of conviction immediately relevant, since it is only a determination of culpability, not of character. The reason that CCs classify by past conviction is that they take it as a *proxy* for risk. They assume (1) that a past offense correlates to future risk, and (2) that convictions correlate to past offenses. But both steps are unstable.

A past offense is, at best, an inexact predictor of future acts. Preventive restraint that classifies on the basis of past acts will necessarily be overbroad. It will restrain many people who would not have committed a future crime. And because conviction classifications like "felon" or "drug offender" import the race and class bias of the criminal justice system, it will often do so along damaging racial and class lines.[271] Conviction is also an unstable proxy for past offenses, because the group of people convicted of a given crime does not align with the group that has committed it. Conviction is both underinclusive (there are many more drug users than drug "offenders") and overinclusive (many people plead guilty who are innocent). The group of people convicted of offense X is likely to represent only a few of those who have committed offense X and some who have not.[272]

Finally, aside from targeting a politically despised group for the sake of a dubious risk proxy, classification by past-conviction status for public safety ends has a perverse, self-fulfilling effect. People excluded from employment, housing, and civic participation on the basis of a past conviction are more likely to commit future crimes.[273] The resulting recidivism statistics are invoked to justify further exclusion. The classification thus relies for justification on a state of affairs for which it is partly responsible and aggravates the very risk that it purports to address.

In summary, past-conviction status is less relevant to public-safety goals than it first appears. Employed as a proxy for risk, it can actually undermine them. On the other hand, laws that classify by conviction are likely to be fueled by animus and paranoia, because convicted "criminals" are convenient political scapegoats and crime paranoia, like racism, is a "lever[ ] of manipulation in the mass political arena."[274] CCs are likely to be both symptom and instrument of political exclusion. For these reasons, classification by past-conviction status for regulatory ends warrants heightened review. Whether the standard of scrutiny is deemed "intermediate," "skeptical," or "rational basis with bite" may be more a matter of semantics than substance. "By invoking heightened scrutiny, the Court recognizes, and compels lower courts to

271 *See, e.g.*, ALEXANDER, *supra* note 22, at 7; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 819 (2014).

272 *Cf.* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1698 (2003) (noting that "[m]any statutes impose collateral sanctions on those convicted of crime without imposing those sanctions on those who engage in identical conduct but are not convicted of it").

273 *See, e.g.*, Jeffrey Fagan & Richard B. Freeman, *Crime and Work*, *in* 25 CRIME & JUSTICE 225 (1999); J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, REGULATION, Summer 2012, at 48.

274 Cover, *supra* note 263, at 1297.

recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment."[275]

2. The Fundamental-Right Argument: The Right to Moral Agency

The second doctrinal argument applies to all targeted, predictive restraints. Unlike restraints like speed bumps or workplace safety rules that target risky activities, predictive restraints like CCs target instead by identity. They restrain individuals or groups who are perceived to be dangerous, on the basis of their purported propensity to commit intentional bad acts in the future. There is an argument that any predictive restraint should trigger strict scrutiny, for purposes of both equal protection and substantive due process, because it infringes a fundamental right implicit in constitutional structure and doctrine: the right to be treated as an equal moral agent.

The doctrinal foundation is the Supreme Court's preventive-detention case law. As discussed above, the Court has held indefinite confinement for dangerousness to violate substantive due process unless the state can demonstrate that the detained person lacks volitional self-control.[276] In apparent contradiction, it upheld pre-trial detention for dangerousness alone in *United States v. Salerno*.[277] Criminal law theorists have reconciled the cases, however, on the basis of a more nuanced version of the mad-or-bad principle. The more sophisticated ideal permits the preventive restraint of people who are "undeterrable"—those whom the threat of punishment cannot dissuade from crime.[278] People who lack volitional control are the paradigmatic case,

275 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 (1985) (Marshall, J., concurring). An alternative argument, which this article lacks space to pursue, is that the "irrebuttable presumption doctrine" might facilitate rational judicial review of CCs. The doctrine, which the Court deployed in the 1970s, held that "where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis." U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring); *see also* Aukerman, *supra* note 30, at 55–63; James M. Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL'Y & L. 1, 11 (2009). The doctrine was discredited because of confusion about its theoretical grounding and limits. In essence, though, it functioned as a least-restrictive-means test that combined elements of substantive due process and equal protection; it prohibited the state from depriving individuals of important interests on the basis of classifications that entailed an irrebuttable presumption *if* more tailored procedures were reasonably available. State courts have continued to deploy the doctrine, including with respect to CCs. *See, e.g.*, *In re* J.B., 107 A.3d 1, 2 (Pa. 2014). It potentially remains viable in federal context as well.

276 *See supra* note 152 and accompanying text.

277 481 U.S. 739 (1987).

278 *See* Christopher Slobogin, *Preventive Detention in the United States and Europe*, *in* PREVENTING DANGER, *supra* note 13, at 137, 151 (explaining that the principle of undeterrability authorizes preventive detention when, and only when, a person would commit future crime "even if the proverbial cop were standing near their elbow"); Slobogin, *supra* note 15, at 4 (suggesting that trait that "distinguishes the dangerous person who may be

but not the only one. Terrorists and enemy combatants may not be easily deterred.[279] It is arguable (barely) that people facing serious criminal charges or imminent deportation might fit this category too.[280] The Court's case law can be read consistently with this principle, as prohibiting preventive detention *unless* the threat of punishment is not adequate to prevent the person in question from committing new crimes. That is, criminal-law deterrence must be the "first line of defense" against future bad acts.[281]

If the Supreme Court's substantive due process case law does reflect a presumption against predictive restraint, and if the presumption means anything, it means that one has the presumptive right to be free from government restraint premised on one's perceived propensity to commit future bad acts. In other words, one has a fundamental right to be treated as an equal moral agent, just as capable as anyone else of choosing not to commit a crime.[282] Any propensity-based restraint infringes that right, and deserves careful review. The state can satisfy strict scrutiny by demonstrating that deterrence is unavailable in the circumstances at hand and that the restraint is the least restrictive available means to achieve the public safety goal. The lesser the restraint, the easier this will be. In the context of CCs, a fundamental right to moral agency would function as a presumption of redemption for those who have completed criminal sentences, the mirror image of the presumption of innocence for those who have only been accused.

There are obstacles to this line of argument. The obvious objection is that the Supreme Court's preventive detention case law is limited to the context of custodial detention and has no bearing on lesser forms of preventive restraint.[283] A second difficulty is that, even if propensity-based regulation warrants greater concern than other *ex ante* regulation, it is not clear that this concern has constitutional dimension.

Each of these objections has an answer, but ultimately the positive law is ambiguous. It is not clear on the basis of the Constitution and precedent alone whether the rule that criminal deterrence must be the "first line of

---

preventively detained from the dangerous person who may not be is imperviousness to criminal punishment," or "*undeterrability*").

279 *See* Corrado, *supra* note 102, at 3–4.

280 The Court has permitted the (limited) preventive detention of people charged with serious crimes and certain immigrants charged with removability. *See* Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001); *Salerno*, 481 U.S. at 741.

281 Schulhofer, *supra* note 13, at 93–94 (arguing that the presumption against preventive restraint may be overcome only if deterrence is unavailable and incapacitation serves as a limited "gap-filler"); *cf.* Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 839–46 (1981) (arguing that either substantive due process or the Eighth Amendment implies right to be punished rather than subject to involuntary treatment or restraint).

282 By "moral agent" I don't mean someone who can make the right decision for the right reasons, just someone who can make the right decision and whose choice to do so, in the view of the legal community, is a moral good.

283 *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.").

defense" against self-determining agents applies to non-custodial forms of restraint. Any argument that it does must invoke normative principles. It must contend that targeting certain people for restraint on the basis of their projected future actions raises a unique concern that the doctrine should reflect. In other words, the argument must be that criminal law furthers an important value by treating all individuals as equal moral agents with equal capacity to obey. There is ample material in criminal law theory to support that position. In addition, some of the Supreme Court's pronouncements on the Constitution's respect for individual dignity and decisionmaking autonomy might help to ground it.[284] Were the Court to recognize a fundamental right to be treated as an equal moral agent, CCs, along with other propensity restraints, would infringe it.

C. Results

In a challenge to any given CC, heightened review would require the government to show, at the least, that the conviction classification was substantially related to an important government interest. The core benefit would be to strip CCs of the presumption of constitutionality and require the defending government to explain the need, in context, for classifying people for disparate treatment on the basis of past conviction alone. This approach would expose the tradeoffs between risk and liberty that CCs make and the judgments behind them, and provide some oversight. It would allow courts to both recognize CCs as an alarming form of risk regulation and also engage in case-by-case adjudication. It would function as a rough requirement of "proportionality" between the harm to be avoided and the burden imposed.[285]

Some CCs would survive heightened review because they are, in fact, narrowly drawn and justified. These are the CCs that would clear the ABA's standards, like "exclusion of those convicted of sexual abuse from employment involving close contact with children, loss of public office upon conviction of bribery, denial of licensure where the offense involves the licensed activity, and prohibition of firearms to those convicted of violent crimes."[286] Speaking more generally, CCs would be likely to survive to the extent that they are tailored in scope, in duration, in process, and in form to the state's

284 *E.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self . . . ."); Sell v. United States, 539 U.S. 166, 177–78 (2003) (recognizing liberty interest in avoiding "forced administration of antipsychotic drugs"); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . ." (alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958))); City of Chicago v. Morales, 527 U.S. 41, 53 (1999) (plurality recognizing "right to remove from one place to another" as "attribute of personal liberty" (quoting Williams v. Fears, 179 U.S. 270, 274 (1900))).

285 *See* Slobogin, *supra* note 15, at 4 ("The *proportionality principle* requires that the degree of danger be roughly proportionate to the proposed government intervention.").

286 ABA STANDARDS, *supra* note 3, at 24 (footnotes omitted) (Commentary to Standard 19-2.2).

regulatory goals. A collateral consequence is tailored in scope if it targets a narrow conviction category with clear relevance to the perceived risk. It is tailored in duration if it is time-limited.[287] Procedural tailoring would include the opportunity for an individual to contest the presumption of risk and opportunities for periodic review. And a CC tailored in form would use the least-restrictive restraint possible to mitigate the risk.

Many CCs, however, should be held unconstitutional pursuant to heightened review. Broad, permanent employment bars should fail.[288] Categorical housing bars should fail. Disqualification from benefits and loans should fail (unless the state claims that they express a judgment of desert or forfeiture, in which case punishment constraints apply). Automatic registration and monitoring regimes based on broad conviction categories should fail. If based on narrow conviction categories, with some individualized risk assessment and periodic review, they might survive. Felon disenfranchisement laws are a special case because *Richardson v. Ramirez*[289] is taken to endorse them all, but that may be a misreading of the decision. If it is read in a more limited sense in the future, all felon disenfranchisement laws should fail heightened review (unless a state decides to disenfranchise people as punishment, in which case punishment constraints apply instead). Immigration consequences are also more complicated because the state justifies them not just as public-safety measures but as exercises of Congress's "plenary power" over immigration, and because non-citizens have lesser liberty rights in some contexts.[290] The problems with using conviction as a proxy for risk should apply at least conceptually, however, in the immigration sphere.

The notion that regulatory classification by conviction status warrants heightened review is not wildly removed from current practice. Some courts have taken this approach to CCs already, especially in the realm of employment.[291] A few decisions have found conviction-based employment bars to violate equal protection, particularly "laws which categorically bar large groups of former offenders from particular occupations."[292] State courts have been particularly responsive to such challenges.[293] For courts to subject all CCs to heightened scrutiny would not require a dramatic departure from current doctrine. It would merely require that courts recognize CCs for what

287 *Cf.* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) (examining duration in the context of criminal background checks).

288 *See* Barletta v. Rilling, 973 F. Supp. 2d 132 (D. Conn. 2013) (employing rational basis review "with bite" to strike conviction-based bar to precious-metals licensing).

289 418 U.S. 24 (1974).

290 *See, e.g.*, Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015) (explaining history and current status of plenary powers doctrine).

291 *See generally* Aukerman, *supra* note 30.

292 *Id.* at 3; *see also Barletta*, 973 F. Supp. 2d at 132.

293 *See, e.g.*, Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973) ("Where, as here, nearly twenty years has expired since the convictions . . . it is ludicrous to contend that these prior acts provide any basis to evaluate his present character.").

they are: a genre of preventive restraint that warrants meaningful constitutional oversight.

Conclusion

CCs, as a whole, have demoted 8.6% of the adult population to lesser legal status. They have done so through the use of a proxy classification that ignores the human capacity for self-determination, undermines the operation of criminal punishment, and magnifies the race and class bias of our criminal justice system. This does not make CCs punishment, but it does make them destructive.

The impulse to classify CCs as punishment—never-ending punishment—is a natural one, because the language of punishment conveys the pain and frustration that CCs cause. It evokes the damage they do to lives, communities, and the social fabric. This impulse also, however, obscures the fact that most CCs claim authority to restrict individual liberty on the basis of a judgment of future risk. They operate according to a predictive risk logic that is deeply at odds with the respect for individual agency that criminal law proclaims, and on which its legitimacy depends. To classify all CCs as "punishment" is to ignore the distinction between these two modes of social control, and promote the entanglement between them. In pragmatic terms, it is unlikely to result in effective limits, and prevents the judiciary and public alike from interrogating the risk judgments that actually motivate most CCs. In abstract terms, it furthers the erosion of the principle that an agency-based criminal law should be the polity's first line of defense against its own members. Instead, this article has urged courts and critics to recognize that CCs are a form of risk regulation that warrants serious constitutional concern. When equal protection and substantive due process challenges to CCs arrive in court, courts should apply heightened review.

Once identified as preventive measures, CCs raise the same questions and concerns as other preventive regimes, within the criminal justice system and outside it. And as one iteration of the ongoing collapse between punishment and predictive restraint, they belong to a broader debate about the future of criminal law. The values of agency and desert that criminal justice is supposed to implement are difficult to apply, susceptible of abuse, and anathema to the modern ethic of efficient regulation. They are also, however, the best protection for certain intangible goods, among them our collective experience of responsibility and redemption. There is momentum now for a major rethinking of criminal justice in America. It should include an effort to recapture the law's respect for individual agency. And it should entail a new, more wary doctrinal approach to CCs.